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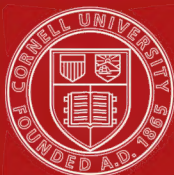
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The law of marriage and family relations



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THE LAW OF MARRIAGE AND
FAMILY RELATIONS

THE LAW

OF

MARRIAGE AND FAMILY RELATIONS

A MANUAL OF PRACTICAL LAW

BY

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TO
THE RIGHT HONOURABLE
SIR PETER O'BRIEN, BART.
LORD CHIEF JUSTICE OF IRELAND
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PREFACE

THIS Law-Book is one of a series, intended as well for laymen as for the profession.

For the use of legal Practitioners, all the usual authorities have been always cited, except where a recent judgment of a Court of Appeal reviews the previous decisions, and then it has been thought safe to omit a reference to the earlier cases. On substantive law directly in point, *i.e.*, Marriage and Divorce, the author has endeavoured to make this Manual an exhaustive treatise; but where the matter discussed is not of direct interest, and is too wide for short treatment, *e.g.*, marriage settlements, the author has summarised or quoted and cited the best text-books. Procedure, being outside the object of this series, is not treated at length; besides, procedure in the Divorce Court is exhaustively treated in the books on Divorce Practice by Mr. W. J. Dixon, and Messrs. Browne and L. D. Powles. But the subject of Chap. XIX, the thesis discussed in Chap. III, s. 5 (*d*), and the collection, at Chap. VII, s. 5 (*b*), of rulings on adultery by the Ecclesiastical Judges, whose authority should at least be equal to judicial

interpretations of wills, have not, so far as the author is aware, been discussed at length by any previous legal writer.

For lay readers, the author's plan has been, not to curtail, but to explain. He has endeavoured, sometimes by stating the proposition at greater length than is usual, sometimes by giving facts that would be redundant in an ordinary law-book, to make every proposition of law clear to the untrained mind. The author hopes that the public will not be repelled by the citation of cases; to have omitted them would have rendered the book useless to lawyers, and none the more intelligible to laymen; and placed as they are in notes, they can hardly embarrass the reading of the text. Having, as above stated, a dual aim in view, the author hopes thus better to hit the mark by (if the conceit may be pardoned) using a double-barrelled gun, than by endeavouring to kill two birds with one stone.

The list of chapters at p. xiii, and the tables of contents prefixed to each chapter, show how the subject has been filled up. Marriage is treated of in its successive stages of solemnisation, the relation of husband and wife thereby created, and its legal determination by means of nullity, divorce, or separation. The relation of parent and child is the subject of Chapter XIV. Property and its rights are only slightly touched on; but in Chapter IV, pp. 192-196, the usual provisions of a marriage settlement of personality are sketched. Statistics illustrating the actual working of the law are given in the notes;

and it may be satisfactory even here to point out that the proportion of divorces to marriage is only 1·30 per 1000.

Besides the actual legal, the religious and canonical obligations of marriage are constantly referred to. In Chap. XVI is given a digest of the existing Roman Catholic Matrimonial Law, explaining the seventeen grounds of nullity. It may be a surprise to know that a conscientious Roman Catholic can apply for and avail himself of divorce, and remarry, if he has previous to the divorce (or even subsequent to it) obtained a decree of nullity from his own Ecclesiastical Court; see pp. 485, 496, 499, 500. In Appendix 2 is given a collection of the opinions of the Fathers, of the Reformers, and of Bishops of the Church of England, and of the Inquisition and Non-conformists at the present day, as to the remarriage of divorced persons. The form of a Roman Catholic dispensation for a mixed marriage is given in Appendix 3.

The author would here respectfully and gratefully express his indebtedness to the many persons who have given him information and assistance, more especially in regard to Appendices 1 and 2. The author has continually applied to strangers for their opinions and their knowledge on matters of grave import, expressly stating that he wrote to them with a view of publishing the answer. To reply at all was granting a favour to the author, and it is his pleasant duty to testify that in almost every case information complete and useful was readily and courteously given. The names of such in-

formants are given elsewhere in the pages of this Manual, by way not merely of acknowledgment, but also as authority for the information so contributed by them and utilised in this work.

In conclusion, the author would direct the attention of the profession, the public, and the Legislature to the following points as seeming to require remedial legislation :—

1. A magistrate's maintenance order, an order in the nature of alimony made by a magistrate on giving a separation for cruelty, and an affiliation order, is not enforceable against the husband's land, stocks, or shares; see pp. 366, 367, 370, 415.

2. A divorced husband frequently succeeds in evading the operation of an alimony order by leaving the jurisdiction and removing his property. The old Chancery practice of preventing him absconding by a writ of *ne exeat regno*, and restraining by injunction removal of property, should be revived; and if he has repaired to a British Colony, legal machinery should be provided for bringing him back under the Fugitive Offenders Act; see pp. 381–383.

3. An Irish husband whose wife commits adultery with an Englishman domiciled in England has no legal remedy against the adulterer; see pp. 567, 568.

4. The issue of a marriage which turns out to be legally invalid, but was contracted *bonâ fide* by one or both parties, are illegitimate by the law of England; but by the law of Scotland, the Canon Law, and the

Code Napoleon, legitimate. It would seem desirable to extend to such issue the benefit of legitimacy; see p. 147.

5. It frequently happens that the marriage of a British subject with a foreigner is invalid abroad by foreign law, but valid in England, so that the British subject is bound for life, while the foreign spouse is free to remarry; see pp. 507, 523, 529. To validate the foreign marriage is beyond the province of domestic legislation, but a corresponding relief might be given by enacting that whenever a marriage between a British subject and a foreigner had been annulled by Courts of the foreign country, such a marriage should become voidable in England at the suit of the British subject.

6. Undisclosed pregnancy of a wife at the date of the marriage is not adultery or any other matrimonial offence; see pp. 27, 155-162, 312, 347. Such conduct by a wife should be declared to be adultery, and a ground of divorce or nullity on proof that there has been no antenuptial intercourse between husband and wife.

7. Finally, it may be suggested that adultery or cruelty proved against a party in the Divorce Court, on which a decree is granted, should be made a statutory five years' disqualification for public office in the same way as bankruptcy. Such a legal disqualification would censure misconduct and obviate reiterated personal public discussions. It could be left to the Court to decide, as in bankruptcy, whether in any particular case the disqualification might, on account of special extenuating circumstances, be removed.

The author begs to thank Mr. H. L. Ormsby for assisting in compiling the list of cases, and for various suggestions throughout the work; and Mr. C. H. Bromby for reading several of the proof-sheets; and others of his friends for assistance or advice given. The author also begs to thank the Librarian and Sub-Librarian of the Inner Temple Library, where this work was mainly composed, for their many courtesies.

NEVILL GEARY.

2 TANFIELD COURT, TEMPLE,
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CANON AND ECCLESIASTICAL LAW OF MARRIAGE. — Corpus Juris Canonici ; Sanchez, de Matrimonio ; Reports of the Rota, and books noted in Chapter XVI ; *Early Text-Books on English Ecclesiastical Law* : Ayliffe's Parergon ; Gibson's Codex ; Lyndwood's Provinciale ; Oughton's Ordo Judiciorum ; Swinburne on Spousals ; *Modern Text-Books on Ecclesiastical Law* : Phillimore's Ecclesiastical Law, etc.

PARLIAMENTARY REPORTS. — The Marriage Laws Commission, 1868 [4059] ; Report on Law as to Prohibited Degrees of Affinity, 1847-48 [973] ; Report of Divorce Commission, 1853 [1604] ; Ecclesiastical Courts Commission, 1833 (70) ; Ecclesiastical Courts Commission, 1883 [3760].

MODERN LAW-BOOKS ON MARRIAGE AND DIVORCE. — Bishop on Marriage and Divorce (Amer.) ; Browne and Powles on Divorce ; Dixon on Divorce ; Eversley's Domestic Relations ; Hammick on Marriage ; Hubback on Evidence of Succession ; Lush on Husband and Wife ; Macqueen on Divorce ; Macqueen on Husband and Wife ; Nicolas on Adulterine Bastardy ; Oakley's Divorce Practice ; Schouler's Domestic Relations (Amer.) ; Shelford on Marriage.

MODERN LAW-BOOK ON INFANCY. — Macpherson on Infants ; Simpson on Infants.

IRELAND.—Falcon's Marriage Law of Ireland. It is believed that there is no other Irish text-book.

SCOTLAND.—Fraser on Husband and Wife; Fraser on Parent and Child, etc. Both are works of the very highest authority; and each contains in the introductory part a Bibliography and List of Authorities.

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LIST OF ABBREVIATIONS

WHEN, as in nearly every divorce case, the name of the respondent is the same as the petitioner's, the name of the respondent has been, for the sake of space, indicated by the first letter only ; thus the case of Smith *v.* Smith is referred to in the text as Smith *v.* S. ; in the table of cases it is printed at length. The name of the co-respondent is always omitted.

The ordinary legal abbreviations for reference to Reports, etc., have always been employed. A full list of these abbreviations can be found in Soule's Lawyers' Reference Manual, and a list of the usual abbreviations of the names of the Reports is given in the catalogues of law publishers and booksellers. In any library where the Reports are accessible no difficulty will be experienced in finding the reference from the abbreviations, which are easily intelligible.

CHAPTER I

INTRODUCTION

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SEC. 1.—HISTORY OF LAW AND LEGISLATION

(a) *Previous to the Reformation*

MARRIAGE was from the earliest times generally regulated in England by the Canon Law. There was very little legislation. Matrimonial causes were within the exclusive cognisance of the Ecclesiastical Courts.¹ And

¹ The rights and privileges of the Church of England were upheld by Magna Carta, confirmed 25 Ed. I. The jurisdiction of the Church Courts was further protected in 1285 by the statute *Circumspecte Agatis*, 13 Ed. I, and by the statute of the writ of Consultation, 18 Ed. I, enacting that where an ecclesiastical judge was stopped by a prohibition from the King's Courts in a case where no remedy could be given in the King's Courts, the Chancellor or Chief-Justice, as being satisfied of this by view of the libel, shall write to the ecclesiastical judge and direct him to proceed. This writ of Consultation directing the Ecclesiastical Court to proceed was the converse of the prohibition stopping them; and this Consultation writ was the chief protection of the

besides the Ecclesiastical Courts having original exclusive jurisdiction when the establishment or annulment of a marriage was directly in issue, and the remedy sought was matrimonial; they had derivative jurisdiction, when an action concerning land was instituted in the King's Courts in which the question of marriage, as in a claim as heir or dowress, arose incidentally. The King's Court would not try the issue of marriage or bastardy, but referred it to the Ecclesiastical Court on an issue of bastardy or *ne unque accouple en loyal matrimonie*, whereon the bishop gave his certificate in favour or against marriage or legitimacy.¹

The decision of an Ecclesiastical Court on a matrimonial question, whether given in a suit within its original jurisdiction or by a certificate on a writ referring the matter as above explained, was accepted by the King's Court as conclusive. It results, therefore, that few or no decisions by King's Courts on matrimonial questions are reported. As to the inherent universal binding authority of the Canon Law, this book is not the place in which to explain and canvass the conflicting theories of Protestants, Anglicans, Ultramontanes, Erastians, on such vexed questions as Independence of the Clergy, the Royal Supremacy, the Liberty of the Church of England, etc.; not even is it worth while to more than mention the legal views as embodied in Chief-Justice Coke's phrase of "The King's Ecclesiastical Law."² These are

Ecclesiastical Court against the King's Court. This remedy was enlarged and amended by 34 Ed. I and 50 Ed. III, c. 4. For a general account of the history of the jurisdiction of Ecclesiastical Courts, see Report of the Commission on Ecclesiastical Courts, 1883 [c. 3760], and Historical App. I, by Canon Stubbs; and see the Commission on Ecclesiastical Courts, 1831 (70).

¹ See *post*, Chap. III, s. 1 (a); VI, s. 1 (b).

² *Caudery's case* (1586), 5 Co. Rep., 1.

matters of "general controversy."¹ But on a question of marriage the following points are clear law.

On the one hand, in all matrimonial matters within the jurisdiction of the Ecclesiastical Courts there was an appeal to the Papal Courts at Rome.² This appeal, although it is said that the Papal Court took notice of local particular customs, must have tended to assimilate the matrimonial law administered in England with, and to aim to eliminate exceptions from the general body of the Canon Law, and so to enforce that law in England.

On the other hand, there are three distinct points as to legitimacy on which the Canon Law was not accepted or recognised by the law of England. First, that by the law of England a ceremony before a priest was necessary to the validity of the marriage, in order that the wife might have dower of her husband's land and the children be heirs;³ whereas by the Pre-Tridentine Canon Law which still prevails, where the decrees of the Council of Trent are not published, simple consent of the parties,

¹ The curious on such points will find much information contained in the Report of the Commission on Ecclesiastical Courts, 1883, and the historical appendices thereto by Canon Stubbs [c. 3760].

² See an early instance of an appeal to Rome, 1158-63, in a case of nullity by reason of a precontract, *Richard de Anesty v. Mabel de Francheville*, *Placita Anglo-Normana*, p. 311. The name of the Court that sits at Rome is the "Rota." For its present procedure and jurisdiction, see *post*, Chap. XVI. The reports of the cases before the Rota began to be published from the middle of the fifteenth century. Possibly if these were read through and the Vatican Records searched, some other traces of English appeals might be found.

³ The House of Lords decided that this had ever been the Common Law of England, *R. v. Millis* (1843), 10 Cl. & F., 534; resting their decision on a string of decisions, and citing a Saxon law of King Edmund, "At the nuptials there shall be a mass-priest by law." *Ancient Laws of England*, Record Series, Laws of King Edmund, p. 109. But in case of a contract to marry, the party could sue on it in the Ecclesiastical Court; see *post*, p. 9.

exchanged secretly and without any ceremony, either *per verba de præsenti* or *per verba de futuro subsequente copulâ* without more, constituted marriage.¹ Secondly, the issue of a void marriage contracted *bonâ fide*;² and, thirdly, the issue of persons who subsequently to the birth of issue intermarry³ are legitimate by the Canon Law, but bastards by the Common Law.

As this conflict of law regarded legitimacy rather than marriage, *i.e.* the issue rather than the parties, there was no opportunity for the ecclesiastics to enforce the Canon Law by spiritual censures of excommunication which were so hard to resist in the Middle Ages. For if the law of the land declared that James was married to Agnes when the Canon Law declared he was married to Julia, the Canon Law would order him to restore conjugal rights to and cohabit with Julia; and in default of his doing so would excommunicate him, which, as a matter of fact, happened in case of Henry VIII. But if, for instance, the Common Law of England declared that George Todd, James' son by Agnes, was legitimate, and heir to the land, and that Agnes was his widow, and entitled to dower of his land, because Charles, the elder brother of George, was born of James Todd and Agnes previous to marriage, and Geoffrey, another

¹ Decretal, 4. 1. 1, and see *post*, Chap. XVI, s. 3 (*n*). To the same effect is the present law of Scotland, Chap. XVIII, s. 2.

² See Introduction to Year Book, 11 & 12 Ed. III, Record Series, pp. xx. and xxiv.; and see old Abridgments, Brooke, Fitz-Herbert, Viner, tit. Bastard; at an earlier date such issue were legitimate, see Bracton, bk. ii., c. 29.

³ This was termed "special bastardy." This point was further established by the Statute of Merton, 20 Hen. III, s. 9, declaratory of the Common Law, where, notwithstanding the petition of the bishop to alter the law, the lay peers exclaimed, "*Nolumus leges anglie mutare*"; and see 25 Ed. III, 9 Hen. VI, c. 11, and Bracton, Book iv. Action for Dower, Book v. on Exceptions, chap. xix.

elder half-brother, was born of a marriage between James Todd and Julia that was never celebrated *in facie ecclesiæ*, but was merely a matter of contract, and Henry, the eldest of all James Todd's sons, was born of a marriage with Jemima, which was subsequently declared void ; George Todd and his mother Agnes would enter on the land as heir and dowress, and the Canon Law, while recognising Henry, Geoffrey, and Charles as legitimate, and Julia as the lawful widow, could not put them in possession of the land, and would not excommunicate George and Agnes, because suits concerning the inheritance to land were always outside the cognisance of the Ecclesiastical Court.¹ However, in the case above given Julia might have sued James Todd in his lifetime on the contract to marry in the Ecclesiastical Court, and on the contract being *established by sentence of the Ecclesiastical Court*, the subsequent marriage to Agnes would have been void at Common and Ecclesiastical Law, see *post*, p. 9 ; but in the case above supposed Julia never obtained a sentence during James Todd's life.

Still the Canon Law may, with these three exceptions, have been said to be the English matrimonial law in pre-Reformation days. The prohibited degrees of relationship prescribed by the Canon Law were specially introduced by Saxon legislation.² The prohibited degrees extended to the fourth degree from the common ancestor, *i.e.* including second cousins.³ This was altered at the Reformation ; see *post*, pp. 7, 8.

¹ A claim to determine matters of dower was put forward by Archbishops Boniface and Peckham, but was never conceded by the Crown, and the claim was tacitly withdrawn ; see Report of Ecclesiastical Courts Commission, 1883 [c. 3760], p. xxiii.

² Ancient Laws of England, Record Series, pp. 109, 135, 156, cited *Wing v. Taylor* (1861), 2 Sw. & Tr., 278.

³ See *post*, Chap. XVI.

With these reservations it may be said that the present existing English matrimonial law is derived from the Canon Law, and except in so far as it is regulated and altered by statute, the Canon Law is still citable as an authority in English Courts on matrimonial questions.

(b) Reformation Statutes

The changes brought about at the Reformation in the law of marriage, the jurisdiction over, and procedure in, ecclesiastical causes, were by Acts of Parliament. Except as altered by statute, the old system prevailed after the Reformation, and with some very slight changes down to 1857. The old Ecclesiastical Courts, Provincial, Consistory, and Peculiar, retained their jurisdiction unimpaired; it was only the final court of appeal was taken from the Pope and vested in the Crown.

The English Reformation commenced under Henry VIII, in about 1532, and by means of statutes was carried on down to death of Edward VI; on the accession of Philip and Mary, most of these statutes were repealed by 1 & 2 P. and M., c. 8, but again re-enacted on the accession of Elizabeth by 1 Eliz., c. 1.¹

The appeal to Rome was abolished, and persons appealing were declared guilty of a premunire.² A High Court of Delegates was constituted the supreme appellate tribunal. Each appeal was referred to a separate and distinct commission, usually composed of lay peers, bishops, judges, and civilians nominated for the occasion. Their

¹ For a general account of ecclesiastical judicature at and after the Reformation, and the changes produced by the legislation of Henry VIII, and his successors, see Report of the Ecclesiastical Courts Commission, 1883 [c. 3760], pp. xxvii.-xxxvi. and *passim*; and see Historical Appendices, I, III, IV, V, XI, XII.

² 24 Hen. VIII, c. 12; 1 Eliz., c. 1, s. 2.

decision was final, although occasionally a commission of review was granted upon petitions to the king in Council referred to the Chancellor.¹ In 1833 the appeal on all ecclesiastical suits was transferred to the Judicial Committee of the Privy Council.²

And in order to secularise the ecclesiastical jurisdiction and establishing the Royal supremacy, it was enacted that all foreign spiritual jurisdiction was abolished and annexed to the Crown ;³ and that doctors of civil law being married, may exercise ecclesiastical jurisdiction.⁴

The principal change in substantive law effected by the Reformation statutes was the alteration of the prohibited degrees of affinity and consanguinity. By Canon Law these extended to those related within the fourth degree, *i.e.* second cousins who are four degrees from the common ancestor, and further affinity was constituted by mere sexual intercourse; see *post*, Chap. XVI, s. 3 (*l*). The Reformation statutes⁵ greatly narrowed and precisely defined the degree of consanguinity and affinity, and the degrees thereby prescribed are still the law.⁶ As a corollary to this legislation, it abolished and annulled all dispensations that would validate marriages within the prohibited

¹ 25 Hen. VIII, c. 19, s. 4 ; 1 Eliz., c. 1, s. 2 ; 8 Eliz., c. 5 ; and see Shelford on Marriage and Divorce, p. 543 ; *Jones v. Bougett* (1739), 1 Atk. 298. For an account of the jurisdiction of the Delegates, see Special and General Report of the Royal Commission on Ecclesiastical Courts, 1831, Parl. Paper (70) ; and see the Report of the Commission on Ecclesiastical Courts, 1883 [c. 3760], pp. xl.-xlv., l.

² 2 & 3 Will. IV, c. 92 ; 3 & 4 Will. IV, c. 41.

³ 1 Eliz., c. 1, ss. 7 and 8.

⁴ 1 Eliz., c. 1, s. 12, reviving 37 Hen. VIII, c. 17.

⁵ 32 Hen. VIII, c. 38, revived by 1 Eliz., c. 1, s. 11. In the Revised Statutes, vol. i., 28 Hen. VIII, c. 7, s. 7, and 28 Hen. VIII, c. 16, s. 2, are printed as a note to 32 Hen. VIII, c. 38 ; and see *Wing v Taylor* (1861), 2 Sw. & Tr., 278.

⁶ See *post*, Chap. II, p. 30 ; and see Report of Commissioners on Law of Marriage, 1847-48 [973].

degrees.¹ Therefore "it is further to be understood that many divorces that were in force by the Canon Law when Littleton wrote are not at this day in force."²

An Act of Edward VI allowed priests to marry.³

The impediment of "precontracts" was abolished by an Act of Henry VIII, but subsequently revived and re-enacted.⁴

As to the provincial constitutions and canons (for a collection of these passed by papal legates, archbishops, and provincial councils, see Gibson and Lyndwood), an Act in the time of Henry VIII empowered the king to appoint thirty-two commissioners to approve or repeal them with the king's consent, and that till such review the existing canons and constitutions, but only in so far as they were not contrary to the laws of the realm, should be in force. No new canons and constitutions to be made except in convocation with the king's assent.⁵ This review was never carried out.⁶ Therefore the then exist-

¹ 28 Hen. VIII, c. 16; and see 25 Hen. VIII, c. 21.

² Co. Lit. 235;—citing this it was decided that carnal intercourse does not now constitute affinity, *Wing v. Taylor* (1861), 2 Sw. & Tr., 278; see Chap. II, p. 31.

³ 2 & 3 Ed. VI, c. 21; 5 & 6 Ed. VI, c. 12; 1 Jac. I, c. 25; and see Art. XXXII.

⁴ 32 Hen. VIII, c. 38; partly rephd. 2 & 3 Ed. VI, c. 23; and see 1 Eliz., c. 1, s. 11; and see *post*, p. 9, as to precontracts.

⁵ 25 Hen. VIII, c. 19; 27 Hen. VIII, c. 15; 35 Hen. VIII, c. 16; 3 & 4 Ed. VI, c. 11.

⁶ Although a *Reformatio Legum* was composed by Cranmer and a sub-committee of eight, and translated into Latin, yet it never received the Royal assent. It is, however, a work of great authority, showing the recognised opinion and sentiment of the Church of England at that time, and containing the views of the first Reformers. In case of adultery by either husband or wife a divorce was allowed, and the innocent party might remarry. Absolute desertion, protracted absence, mortal enmities, and lasting cruelty were allowed as lawful causes of divorce; see First Report of the Divorce Commission, Parl. Paper, 1852-3 [1604]. Report of the Ecclesiastical Courts Commission, 1883 [c. 3760], pp. xxxi.-xxxiii., xxxvi.

ing canons and constitutions remain. In 1603 and at subsequent times canons have been made in convocation. But they do not *proprio vigore* bind the laity except so far as they are in confirmity with the law of the land.¹

(c) *Subsequent Legislation and Law of Divorce*

Except and previous to Lord Hardwicke's Act, there was little or no subsequent matrimonial legislation. During the Commonwealth marriages were solemnised before Justices of the Peace, and at the Restoration statutes were passed to validate them.² By Acts passed under William and Mary, and Anne, duties on marriage licences were imposed for revenue purposes; they did not affect the validity of the marriage.³

Lord Hardwicke's Act, so far as it relates to marriage, is subsequently explained; but it also abolished precontracts by enacting that no suit should be brought in any Ecclesiastical Court to compel a marriage by reason of any contract, *per verba de præsenti* or *verba de futuro*, entered into subsequent to 1754.⁴ Previous to that, where there had been a contract of marriage by words, or a promise of marriage, either party might sue in the Ecclesiastical Courts to compel a marriage in church, which was ordered to be solemnised in sixty days.⁵

The precontract also constituted an impediment to a

¹ *Middleton v. Crofts* (1736), 2 Atk., 650.

² 12 Car. II, c. 33; 13 Car. II, c. 11.

³ 5 & 6 Will. and Mar., c. 21; 6 & 7 Will. and Mar., c. 6; 10 Anne, c. 19.

⁴ 26 Geo. II, c. 33, s. 13; and see *post*, p. 33, and as to breach of promise of marriage, Chap. XII.

⁵ *Baxter v. Buckley* (1752), 1 Lee, 42; if the respondent refused to obey and solemnise, he was monitioned and then imprisoned; see Oughton, tit. 203, 204, 209-212, the Clerk's Instructor in the Ecclesiastical Courts, chap. iv, pp. 308-322, giving form of proceedings; Clarke's Praxis, tits. cclxvii., cclxxv., cclxxvi.

second marriage.¹ If the contract was per *verba de præsenti*, neither party could release the other;² and on proof thereof any subsequent marriage by one of the parties to any other person was rendered null and void, and so declared by the Court.³ If the marriage was per *verba de futuro*, it could be released by either party, and bringing a temporal action for damages waived the remedy in the Spiritual Court.² If the precontract was per *verba de futuro*, and no carnal intercourse had taken place, a second marriage to another person would not be annulled.³

No change was effected in the substantive law of marriage, either as to what constituted marriage or as to the impediments to marriage, by the Reformation legislation beyond the defining of the prohibited degrees. The Temporal Courts, however, became more prone to interfere with the Ecclesiastical Courts by way of prohibition.⁴ And in case of marriage within the degrees of consanguinity and affinity, which, previous to the Marriage Act, 1835, 5 & 6 Will. IV, c. 54,⁵ were voidable by decree of the Court, but not void, the Temporal Courts always interfered and prohibited the Ecclesiastical Court annulling the marriage after the death of either of the parties, although the survivor might be proceeded against for incest. So if persons married within the prohibited degrees could escape a suit to

¹ *Bunting v. Lepingwell* (1585), 4 Co. Rep., 29a; Swinburne on Spousals, sec. 18, Effect of Spousals; Clarke's Praxis, tit. excix., cc.

² *Jesson v. Collins* (1704), 2 Salk., 437; also a sentence against the contract in the Spiritual Court barred the action and stopped the plaintiff suing for damages in the Temporal Court, *Dacosta v. Villa Real* (1734), 2 Str., 961.

³ Swinburne on Spousals, sec. 18, Effect of Spousals.

⁴ See Report of Ecclesiastical Courts Commission, 1883 [c. 3760], p. lii., and App. VI.

⁵ Sometimes called Lord Lyndhurst's Act; the new short title is by 55 Vict., c. 10.

annul the marriage during the joint lives (which suit could be instituted by any one interested, see Chap. VI, s. 2), the marriage would be valid and the issue legitimate.¹ In 1835, the Marriage Act, 1835, made these marriages utterly void in future, and with some reservations validated past marriages within the prohibited degrees of affinity.² In 1847 a Royal Commission was appointed to take evidence as to prohibited degrees of affinity, and in their report they stated that Lord Lyndhurst's Act did not prevent such unions, and were in favour of an alteration of the law; see *post*, p. 30, n. 3. But no legislation followed.

Except after and in respect of the Marriage Acts, Lord Hardwicke's in 1753 and the present Acts in 1824 and 1836, and as regards the prohibited degrees after 1835, the Ecclesiastical Courts, up to the abolition of their jurisdiction in 1857 (and now the Probate and Divorce Division), acted on the same principles and administered the same law as before the Reformation in respect of marriage and nullity of marriage.³

As regards divorce, the rule of the Canon Law was that marriage was indissoluble. A divorce *a mensâ et thoro* was, under certain conditions, granted for adultery or cruelty, but this did not allow the parties to remarry.⁴ For about fifty years after the Reformation, from 1550 to 1602, the doctrine of indissolubility was repudiated by the Church of England, and a divorce for adultery allowed

¹ *Pride v. Lord Bath* (1695), 1 Salk., 120; *Harris v. Hicks* (1693), 2 Salk., 548; Brook, N. C., 12; 24 Hen. VIII, p. 12, and tit. Bastardy, Brownl.; but the marriage did not, because not annulled, become lawful. See *Fenton v. Livingstone* (1859), 3 Macq. 497; see *post*, Chap. XVII, s. 2 (b); and see Chap. II, p. 32.

² 5 & 6 Will. IV, c. 54; and see Chap. II, p. 30.

³ For an account of law and Court since the Reformation, see Report of Ecclesiastical Courts Commission, 1883, pp. 36-52, App. XI.

⁴ See First Report of the Royal Commission on Divorce, 1853, Parl. Paper, 1852-53 [c. 1604].

the parties to remarry.¹ About 1600 this doctrine was reimposed, and it was declared that a divorce was but *a mensâ et thoro*, and not *a vinculo matrimonii*, and that a second marriage by either party was void.² But it was only in 1641 that the King's Bench on a case reserved, and with great hesitation held that a second marriage, after a sentence of divorce, was bigamy under 1 Jac. I, c. 11.³

And down till 1857 it continued to be the ecclesiastical law of England that marriages were indissoluble.⁴

But Parliament by way of private Bill gave a legislative divorce; see *post*, p. 17.

In 1857, after a Commission on Divorce,⁵ under Lord Palmerston's Government, Sir R. Bethell introduced the new Divorce Act, establishing the Court. The Bill was vehemently opposed by Mr. Gladstone.⁶ The Bill, however, became law. As to provisions and the statistics of divorces granted under it, see *post*, Chap. VII.

(d) Lord Hardwicke's Act

By the Common Law of England, which prevailed down to 1754, the presence of a clergyman in holy orders, either of the Church of England or the Church of Rome, at the time of solemnisation was essential to the valid

¹ See Report of Commission on Divorce, 1852-53 [1604], pp. 4-6; and see *ante*, p. 8, n. 6, and *post*, App. 2.

² *Ib.* p. 6, citing *Foljambe's case* (1601), Moore 683, 3 Salk., 138.

³ *Porter's case* (1641), Cro. Car., 461.

⁴ See Report of the Commission on Divorce, 1852-53 [1604].

⁵ *Ib.*, and Select Committee of the Lords, 1856 (181).

⁶ See Nash's Life of Lord Westbury, vol. i., pp. 210-254; and Hansard, 3rd series, vols. 145-147. Mr. Gladstone, in answer to an application by the author, most kindly and courteously wrote the following:—

“DEAR SIR,—Briefly and promptly, my opinions on divorce are the same as in 1857; while now, as then, I do not disguise the great difficulties of the subject.—Your faithful and obt., W. E. GLADSTONE.

“March 23, 1892.”

constitution of marriage; but a marriage solemnised by any such clergyman, whether publicly or privately, at whatever time or place, and in whatever form or manner (between persons competent), was valid without any previous publication of banns, licence, notice, or residence.¹ Under this system, the Fleet marriages and the marriages at Keith's chapel were valid. In 1753 a Bill was introduced by Lord Hardwicke to prevent these clandestine marriages, which, after meeting considerable criticism, was passed.² This measure, known as Lord Hardwicke's Act, is on the same lines as the Marriage Act, 1823 (see *post*, Chap. II), and imposed the necessity of residence, banns, or licence, and marriage in parish church or licensed chapel.

The nullifying clause in Lord Hardwicke's Act is, however, much stricter, for the present Acts only impose a nullity where both parties knowingly and wilfully neglect its provisions. Lord Hardwicke's Act enacted that "all marriages solemnised after March 25, 1754, in any other place than a church or such public chapel (see *post*, p. 59), unless by special licence as aforesaid, or that shall be solemnised without publication of banns, or licence of marriage, from a person or persons having authority to grant the same, first had and obtained, shall be null and void to all intents and purposes whatsoever."³ If this provision was transgressed,—ignorance or good intention by one or both parties was immaterial,—the marriage was void.

Therefore marriage in a church where marriages could

¹ See *R. v. Millis* (1843), 10 Cl. & F., 534. The Common Law is considered *post*, Chap. II, see p. 78.

² See Cobbett's *Parliamentary History*, vol. xv. (1753), p. 1; see Campbell, *Lives of the Chancellors—Lord Hardwicke*, vol. v., p. 124; see Horace Walpole's *Memories of George II for 1753*. Three attempts were made in vain to repeal it, in 1765, 1762, and 1781.

³ 26 Geo. II, c. 33, s. 8.

not lawfully be solemnised was void, although the parties acted innocently and were deceived.¹

Also as to banns, if published in false names, including such a variation or suppression of the real name as would conceal the identity, the publication was null, and therefore the marriage void, although only one of the parties knew of the undue publication.²

The severest restriction in the Act was that as to the marriage of minors by licence. It was provided that all marriage of minors, except widows or widowers, by licence had without consent of the father, or if dead, of the guardian, or if no guardian, of the mother if alive and unmarried, or if she were dead or married, then of the guardian appointed by the Court of Chancery, should be null.³

Under this clause some very hard cases arose. In some cases marriages were declared null after ten or twenty years' cohabitation and birth of issue, because of some technical informality.⁴ The consent of the father, if alive, was absolutely necessary to the marriage of a minor by licence. So that even where a father had gone to America and was supposed dead, and the mother had given her consent, but the father had no knowledge of the marriage, it was declared void after eighteen years' cohabitation for want of his consent.⁵ And in another

¹ *R. v. Northfield* (1781), 2 Douglas, 659; and see *post*, Chap. II, s. 3 *f*).

² See Shelford on Marriage and Divorce, pp. 232-259; *Stanhope v. Baldwin* (1822), 1 Add. Ec., 93; neither are such marriages validated by 3 Geo. IV, c. 75; *R. v. Tibshelf* (1830), 1 B. & Ad., 190; *Stayte v. Farquharson* (1826), 3 Add. Ec., 282. Under the present law *both* parties must be proved to have concurred in the undue publication in order to avoid the marriage; see *post*, Chap. II, s. 3 *b*).

³ 26 Geo. II, c. 33, s. 11.

⁴ See instances detailed in debates, Cobbett's Parliamentary Debates, vol. xxxix., p. 1466, vol. xli., p. 1445.

⁵ *Hayes v. Watts* (1819), 3 Phillim., 43.

case where there had been twenty-two years' cohabitation and seven children, the husband obtained a declaration of nullity because he was about six weeks under age at the date of the marriage, although he had himself sworn on applying for the licence that he was of age. For no length of cohabitation or any other facts created an estoppel.¹

As to illegitimate children, neither the consent of the putative father or mother was sufficient to legalise the marriage by licence of a minor bastard ; there must be consent of a guardian appointed by the Court of Chancery.²

The annulment of marriages on these grounds became a public scandal and an individual hardship, and in 1822, when a new Marriage Bill was introduced, a clause was brought in by the Archbishop of Canterbury (Manners Sutton) and the Archbishop of York (Harcourt), and notwithstanding the strenuous opposition of the brothers, Lords Eldon, L. C., and Stowell, passed on a close division.³ The Act validated all such marriages in the past where the parties had cohabited till death or till July 22, 1822, unless, as therein mentioned, the marriage had been previously declared invalid, or where either of the parties had lawfully intermarried with some other person.⁴

¹ *Johnston v. Parker* (1819), 3 Phillim., 39 ; in another case nullity was declared because the testamentary guardians who had consented were appointed by a will which turned out to be invalid because attested by only one witness, *Reddall v. Leddiard* (1820), 3 Phillim., 256 ; and see other cases collected, Waddilove's Digest, pp. 229-231 ; as to the sentence being declaratory and no estoppel, see *post*, Chap. VI, ss. 1 (b), 3.

² *Priestly v. Hughes* (1809), 11 East., 1 ; *Droney v. Archer* (1815), 2 Phillim., 327 ; *Horner v. Liddiard* (1799), 1 Hag. Con., 337.

³ Hansard, 2nd series, vol. ix., pp. 542, 649. A measure validating these marriages had been introduced in 1819, but was lost in the House of Commons by 98 to 27 votes ; see Cobbett's Parliamentary Debates, vol. xxxix., pp. 1028, 1461.

⁴ 3 Geo. IV, c. 75 ; and see *Bridgwater v. Crutchley* (1823), 1 Add., 473 ; *King v. Sansom* (1826), 3 Add., 277 ; and *Poole v. P.* (1831), Younge, 331 ; *Duins v. Donovan* (1830), 3 Hag. Ec., 301.

(e) *The present Marriage Law*

The present law is mainly contained in two statutes, Geo. IV, c. 76 for the Church of England, and 6 & 7 Will. IV, c. 85 for Dissenters.¹ In 1865 a Royal Commission was issued to inquire into the marriage laws of the United Kingdom of Great Britain and Ireland. Their report contains a statement of the law as it then existed, which, with the exception of the prolongation of the hours of marriage (see *post*, p. 64), and the changes effected in Ireland by the Disestablishment of the Church of Ireland (see *post*, Chap. XIX) is now the existing law. The Commission made recommendations in favour of uniform marriage laws for the United Kingdom, and made suggestions as to the principles on which such a measure should be formed.² No legislation has followed the recommendations of this report.

SEC. 2.—CITATION OF AUTHORITIES

In all cases except dissolution of marriage, the Probate and Divorce Division is by the Matrimonial Clauses Act, 1857, specially directed to follow the principles of the Ecclesiastical Courts. So in cases of nullity, judicial separation, or restitution, whatever authorities were citable in the Ecclesiastical Courts are now citable in the Probate and Divorce Division; in cases of dissolution the same authorities are cited, but are not so binding. The authorities cited may be instanced as the Canon Law, *i.e.* the *Corpus Juris Canonici*, and its commentators, including, in particular, Sanchez;³ the older text-books,

¹ See *post*, Chap. II, ss. 3, 4.

² Report of Marriage Laws Commission, 1867-68 [c. 4059].

³ The authority of Canon Law has been considered as a general

Clarke, Godolphin, Oughton ; the decisions of the Ecclesiastical Courts in England. These decisions are reported under the name of Lee's Reports, the judgments of Sir George Lee from 1752 to 1758, with some earlier cases ; Haggard, Consistory reports, being the decisions of Lord Stowell from 1790 to 1820, and the regular reports beginning in 1809 and reaching down to the establishment of the Divorce Court in 1857, being in order of date, Phillimore's Reports, Haggard's Ecclesiastical, Curteis, Robertson, Notes of Cases, Spinks, Deane and Swabey. The decisions of the Irish Ecclesiastical Courts are reported by Milward.¹

The citation of authorities is peculiarly a matter for the practising lawyer, and is not further relevant to the scope of this work.

SEC. 3.—LEGISLATIVE DIVORCE

In consequence of the indissolubility of marriage in the Courts, a practice arose about the year 1700 to pass through both Houses of Parliament a Bill dissolving the nuptial tie between the parties, and allowing them to remarry. In 1436 a marriage obtained by force was declared void.² In 1551, the second marriage of Lord Northampton, who had divorced, in the Ecclesiastical Court, his first wife for adultery was declared valid.³ In 1666, two Acts were passed ;

question, *supra*, pp. 1 and seq. ; the citations following it by the Ecclesiastical judges is carefully noted in Bishop on Marriage and Divorce, 6th ed., secs. 52-55.

¹ See Bishop on Marriage and Divorce, 6th ed., secs. 58-65 ; and see an account of old authorities given in Fraser on Husband and Wife, 2nd ed., vol. ii., xxxiv.

² Rot. Parl., 15 Hen. VI, Nos. 14 and 15, Isabell, widow of John Botiller and William Pulle.

³ 5 & 6 Ed. VI, c. 4 ; Report of Royal Commission on Divorce, Parl. Paper, 1853 [c. 1604], pp. 57 and seq.

the first bastardising the issue of Lady Anne Roos on account of her adultery, the second allowing Lord Roos to remarry.¹

After this, in 1697 and 1700, the Earl of Macclesfield and the Duke of Norfolk obtained divorce Acts for their wives' adultery, and from that time the legislative process became established, so that from 1715 to 1775 sixty Bills were passed, from 1775 to 1780 they increased to seventy-four, and from 1800 to 1852, one hundred and ten were passed. Of these, only four were obtained at the wife's instance on account of the aggravated adultery of the husband, but the husband commonly obtained it for simple adultery by the wife.² This practice proving costly and unsatisfactory, the Divorce Court was established in 1857.³

Since 1857, owing to the establishment of judicial divorce *a vinculo*, divorce Bills are more rare; but in 1886, on the occasion of a divorce Bill promoted by an Irish wife (see *post*, Chap. XIX), the House of Lords laid down that since the passing of the Matrimonial Clauses Act 1857, whatever would justify divorce and afford a legal ground for it, according to the provisions of that Act, where that Act prevails, will afford sufficient ground for an application to the Legislature to grant a divorce in that part of the United Kingdom where the Act does not itself operate.⁴

SEC. 4.—RESTRAINT OF MARRIAGE

The law of England encourages marriage. It also presumes in favour of its validity; see *post*, Chap. III, s. 4.

¹ 19 Car. II, c. III; 22 Car. II, c. I; Private Acts, and see note, above.

² For account of legislative divorce, see Report of Commission on Divorce, 1852, 3 [c. 1604]; and see Macqueen, *Practice of the House of Lords*.

³ See Debates in Hansard in 1857.

⁴ *Westropp's Divorce Bill* (1886), 11 App. Cas., 294; for procedure on Divorce Bills, see Standing Orders of the Lords and Commons.

A marriage is a legal consideration,¹ and a settlement in consideration of marriage is valid against creditors.²

So contracts³ and conditions in a will or settlement in general restraint of marriage are void.⁴ But a contract or condition in a will or settlement not to marry a particular person, or not to marry without consent, is valid.⁵ And it is a frequent clause in will or settlement, that if the beneficiary marries without the consent of a designated person, the beneficiary's interest is or may be forfeited; and such a condition is valid.⁶

Marriage brocage contracts, *i.e.* payment of money to a stranger to procure a marriage, are void, and the money may be recovered back.⁷

A condition or limitation in a bequest to a married woman, that she should live separate from her husband, is unlawful; and, according to the construction of the will, the legatee either takes absolutely free from the condition, or the bequest is void.⁸ Also a bequest to future illegitimate children, born after the testator's death, is void, and passes into the residue or to the next of kin.⁹

¹ See *Holder v. Dickeson* (1673), Free., pt. i., p. 96.

² Chitty on Contracts, 12th ed., p. 287.

³ *Ib.*, pp. 683, 684; and see *e.g.* *Hurtley v. Rice* (1808), 10 East, 22.

⁴ See Pollock on Contracts, 5th ed., pp. 334-336.

⁵ Davidson's Precedents in Conveyancing, 3rd ed., vol. iv., p. 38; and see *Dawson v. Oliver-Massey* (1876), 2 Ch. D., 753, C. A.; so a condition in a Jewess's will, forfeiting her daughter's interest if she married a Christian, is valid; *Hodgson v. Halford* (1879), 11 Ch. D., 959.

⁶ Davidson's Precedents, 3rd ed., vol. v., p. 72; *Scott v. Tyler* (1787), White & Tudor's L. C., where all the cases on this clause are collected; and see Vaizey on Settlements, p. 1231.

⁷ Chitty on Contracts, 12th ed., p. 684; *Scribblehill v. Brett* (1703), 4 Bro. P. C. 144.

⁸ *In re Moore* (1888), 39 Ch. D., 116 C. A.

⁹ See *Dover v. Alexander* (1843), 2 Hare, 275; *Occleston v. Fullalove* (1874), L. R. 9 Ch. 147; *in re Bolton* (1886), 31 Ch. D., 542, C. A.; *Hastie's Trusts* (1887), 35 Ch. D., 728; *Thompson v. Thomas* (1891), 27 L. R. Ir., 457.

CHAPTER II

VALIDITY OF MARRIAGE ¹

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¹ In the year 1889, 213,865 marriages were registered in England and Wales, *i.e.* at the rate of 14·7 persons married to 1000 living. See the Registrar-General's Report for 1889, pp. v. and vi., xxviii., lxxv., lxxvi., tables 2, 3, 4, 39 to 46, where international statistics are given: the report states that as usual the marriage rate rose with the mean value of exports per head of population, the year 1889 having been the highest since 1884, when the rate was 15 per 1000.

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SEC. 1.—DEFINITIONS

THE requirements of a valid marriage are usually defined by describing the impediments. These impediments have been divided by the Canonists and Jurisconsults into dirimitory and impedimental impediments, and by the further division into impediments that make marriage void, and impediments that make it voidable. The following definition may be taken as being, if not exhaustive, at all events universal: "A valid marriage is constituted when a man and a woman, not within the prohibited degrees of relationship, being both of them sane, unmarried, potent, and of the proper age, do of their free will, mutually and personally, go through the necessary formalities."

The definitions of marriage given by theological writers and jurists usually apply to the effect of the legal act of marriage and the status or contract thereby created; among the best of these is that of Portalis, which is usually cited with approval by all French jurists: "La société de l'homme et de la femme qui s'unissent pour perpétuer leur espèce, pour s'aider par des secours mutuels, à porter les poids de la vie et pour partager leur commune destinée,"

For such effect, in so far as it imposes definite legal and mutual obligations, see Chap. IV.

But to enter upon a discussion as to whether marriage is a status or a contract lies equally outside the scope of this work, as to discuss whether, and under what circumstances, it is a sacrament.¹

It should be observed that marriage is a personal act, and the parties themselves, and not by proxy, must go through the marriage rites and ceremonies.²

The impediments to marriage were summed up by one of the Canonists thus :—

“Error conditio votum cognatio crimen
Cultu disparitas, vis, ordo, ligamen honestas
Si sis affinis, si forte coire nequibis
Si parochi, et duplicis desit præsentia testis
Rapta vi sit mulier nec parti reddita tutæ
Hæc facienda vetant connubia, facta retractant.”

In this chapter, however, impediments have been divided into impediments in substance that appear to the ordinary sense of mankind as to capacity of persons to contract marriage, which is uniform throughout the United Kingdom ;³ and requirements of positive law, that arise from non-fulfilment of the proper formalities, as *e.g.* obtaining a licence. Subject to these following conditions or impediments of form and substance, it may be laid down generally that any man may marry any woman.

¹ Marriage is not a sacrament, according to the Articles of the Church of England, XXV and XXXII.

² Although the Canon Law has always permitted marriage by proxy ; see Sanchez, lib. 2, disp. xi., *e.g.*, the marriage of Napoleon I with Marie Louise, where the Archduke Charles represented the Emperor as his procurator ; and see *post*, Chap. XVI, s. 3(n) ; and English Royal marriages have sometimes been by proxy, as Margaret Tudor, on January 27, 1503, to the King of Scotland, represented by the Earl of Bothwell ; Arthur, Prince of Wales, May 19, 1499, to Catherine of Arragon ; and Charles I, May 1, 1625, by the Duc de Chevreuse at Paris ; and see App. 4 as form of marriage by proxy.

³ Report of Royal Commission on Laws of Marriage, 1868 [c. 4059], pp. 5 and 26.

So persons attainted for treason and outlawed can validly marry abroad and probably inside England.¹ Also paupers can marry.² Dumb persons can marry by giving their assent by signs.³

Difference in religion is now no obstacle.⁴ Formerly a marriage between a Jew and a Christian was a felony punishable by being burnt alive ;⁵ and where a Jew was married to a Jewess, and one of the parties became a Christian, it was anciently adjudged that the marriage was dissolved, and that the Christian spouse might re-marry.⁶ But the marriages of Jews, either between themselves or mixed, are now valid ; see *post*, s. 4 (*f*), p. 97 and seq. ; and see p. 100, n. 5.

Marriages between Englishmen and Welsh women were once subject to same disabilities.⁷ Now, however, it is only persons of the Royal Family, descendants of George II, who are subject to any special incapacities to marry ; see *post*, s. 6 ; all other persons are free to marry.

SEC. 2.—IMPEDIMENTS IN SUBSTANCE

(a) *Force or Duress, Fraud and Error*⁸

As in all other legal acts, force or duress practised on

¹ *Kynnauld v. Leslie* (1866), L. R. 1, C. P., 389.

² *R. v. Seward* (1834), 1 A. & E., 706.

³ *Harrod v. H.* (1854), 1 K. & J., 4 ; Swinburne on Spousals, 204 ; Burns, Parish Registers, p. 159 ; and see Notes and Queries for 1857, 2nd series, vol. iv., p. 489.

⁴ *Disparitas cultus, ordo* and *votum* were canonical impediments ; see *post*, Chap. XVI, s. 3 (*d*) (*g*) (*i*). By the law of England, Romish priests, monks, and nuns can and do lawfully marry ; see *ante*, p. 8. But 13 E. & I. Stat. West., see c. 34, still in force, enacts that elopement with a nun is punishable with fine and three years' imprisonment.

⁵ 3 Co. Ins., 89.

⁶ Co. Lit., 31*b*, 32*c* ; this is in accordance with Canon Law, see Chap. XVI, s. 3 (*g*), and by a Jewish law marriages between Jews and Christians are forbidden.

⁷ 4 Hen. IV, c. 26 ; Repl. 21 Jac. I, c. 28, s. 11.

⁸ For the Canon Law on this subject, see *post*, Chap. XVI, s. 3 (*b*) (*h*) (*o*).

either of the parties will render the marriage voidable, the reason of it being there is no consenting mind.¹

Actual physical constraint and imprisonment will nearly always avoid a marriage; but when there is no actual violence, but only threats, then the threats must be such as would have a reasonable influence on the mind; and in considering the influence of such threats, regard will be had as to whether the subject was weak and very young. To annul such a marriage, recourse has been had sometimes to the Court and sometimes to the Legislature by Bill.²

A recent well-known case will explain this doctrine. Lena Mary Scott, the petitioner, was a young lady of quality, who attained twenty-one in February 1885, and then became entitled to £26,000 in possession, with a much larger sum in reversion. Before she came out, while still a mere child, she became acquainted with the respondent Sebright, who was some few years older than herself, and he soon asked her to marry him, which she refused to do; but they subsequently became engaged, and though at times disagreements sprang up between them, the engagement was not broken off. In 1885 the respondent, being pecuniarily embarrassed, persuaded the petitioner to cash bills for him to the extent of £3325, and the respondent not having provided funds to meet the bills, the holders pressed the petitioner for payment, issued writs, and threatened bankruptcy proceedings. The effect of these threats of legal proceedings was to reduce the petitioner to such a state of mental and bodily

¹ See Chitty on Contracts, 12th ed., p. 219; and the subject of forced consent is discussed in Sanchez, bk. iv., and Bishop on Marriage and Divorce; Fraser on Husband and Wife, 2nd ed., pp. 444-448; and see Year Book, 11 & 12 Ed. III, Rolls Series, xxiii., xxiv., 361-363, 391-393; *Fulwood's case* (1638), Cro. Car., 488. 493.

² *Field's Marriage Annulling Bill* (1848), 2 H. L. C., 48.

prostration that she was unable to resist the pressure brought upon her, as was testified by the medical adviser and by long incoherent letters she wrote to a solicitor, which could only be the production of a mind enfeebled by disease. In January 1886 the pressure was increased, and the respondent and one B. told the petitioner that if she would marry the respondent the bills would be settled, and the respondent told Miss Scott that if she did not marry him he would ruin her. On the 29th January, Mr. Sebright wrote Miss Scott to meet him the next day about the bills. Miss Scott went in a cab with a servant, whom she dropped at a shop; and the respondent stopped the cab, got in, and told the cabman to drive to the Registry Office. She had no idea that she was going to a marriage office; but the respondent, grasping her arm, took her up-stairs, and threatened to shoot her if she showed that she was not there of her own free will; and a Count Valhermay stood at the door and refused to let her leave the room. She said the formal words in the superintendent-registrar's presence, and then took off the wedding-ring and threw it on the ground. She refused to sign the book until the respondent again threatened her, and took her by the arm. She then left the respondent, and only saw him twice since. The marriage was not consummated, and Mr. Izod, having examined her in March 1886, when her mother first heard of the marriage, pronounced her *virgo intacta*.

On Miss Scott presenting a petition to have the marriage annulled, Mr. Justice Butt, hearing the evidence, of which the above is a summary, declared the ceremony performed at the registry null.¹

¹ *Scott v. Sebright* (1886), 12 P. D., 21; but see the subsequent case of *Cooper v. Crane* (1891), P. 369, where a marriage at St. Bride's Church was held good and valid, because, although the petitioner

And so, where a wealthy girl of fifteen was decoyed away from a boarding-school by conspirators with a false tale of her father's bankruptcy and arrest for debt, representing that her marriage would release him from his difficulties; and she, therefore, being taken to Scotland, declared herself married, but the marriage was never consummated, — the House of Parliament annulled the marriage by an Act.¹

And even where there is no actual force, yet where there is a weakness of mind, not quite reaching lunacy, or very tender years, and a person having an influence over such weak-minded individual uses it to compel a marriage, such a marriage will be void.²

But such force or duress in order to constitute a ground of nullity must be unlawful force; so if a person elopes with a ward of Chancery, and being ordered by the Court to marry her, and taken to the Church in the custody the sheriff or tipstaff,³ the marriage cannot afterwards be annulled.

And although non-consummation is a very material fact towards inducing the Court to declare the marriage void, yet in *Lord Portsmouth's* case, notwithstanding the alleged wife had had issue and several years had elapsed, yet Lord Portsmouth's committee was successful in having the marriage declared null and void.⁴

Although a marriage obtained by force is void, yet, if after such marriage the husband have intercourse with

thought the ceremony void, yet she gave her unconstrained assent; and see *Templeton v. Tyrec* (1872), L. R., 2 P. & M., 420.

¹ *Miss Turner's* case, Session 1827, Macqueen's House of Lords Practice, p. 642, 7 & 8 Geo. IV, c. lxvi.

² *Harford v. Morris* (1776), 2 Hag. Con., 423; *Lady Portsmouth v. Lord Portsmouth* (1828), 1 Hag. Ec., 355; *Wilkinson v. Wilkinson* (1845), 4 N. of C., 295.

³ *Re Stewart* (1828), 2 Irish Law Recorder, 112.

⁴ *Portsmouth v. P.* (1826), 1 Hag. Ec., 355.

the woman against her will, he cannot be prosecuted for rape;¹ but he can be indicted for abduction.²

Fraud or error.

No misrepresentation or concealment by either party as to their virtue, prospects, and station will suffice to annul a marriage, or is even a ground for setting aside or rectifying a marriage settlement, in fact, *caveat emptor* is the rule. So if a man, meeting an adventuress and being deceived by her guiles, marries her and subsequently discovers that she is a poor strumpet, he cannot have either the marriage dissolved,³ nor could he have any settlement he might have made on her set aside.⁴

So if a man, having married a woman, then discovered her to be pregnant, following on antenuptial intercourse with some other man, he has, it seems, no remedy; for, though grossly fraudulent, she is not guilty of adultery, nor, indeed, would such pregnancy of the wife be an excuse to the husband for deserting her.⁵

In the United States, however, antenuptial pregnancy is a cause for annulling the marriage.⁶

¹ Hale's P. C., vol. i., p. 629; and see Chap. XV.

² 24 & 25 Vict., c. 100, s. 53, replacing 3 Hen. VII, c. 2; see Hale's P. C., vol. i., p. 659; Hawk P. C., chap. xli.

³ Ayliffe's Parergon, 363, where it is laid down that it is an act of virtue to marry a strumpet; and see *Clowes v. Jones* (1842), 3 Curt., 185; and *Wakefield v. Mackay* (1807), 1 Phillim., at pp. 136*n*, 137*n*.

⁴ *Johnston v. J.* (1884), 52 Law Times, 76, C. A.; *Barrow v. B.* (1774), Dick, 504; and see Chitty on Contracts, 12th ed., p. 287.

⁵ See *Kennedy v. K.* (1890), 62 L. T., 705; but in *Sullivan v. S.*, on a private Bill to annul a marriage, the House of Parliament heard evidence of antenuptial incontinency in order to justify a desertion; see 2 Add., 306*n*, and see *post*, pp. 312, 313. As to the legitimacy of the issue, see *post*, p. 155.

⁶ Bishop on Marriage and Divorce, vol. i., sec. 179 and seq., citing *Reynolds v. R.* (1862), 85 Mass. (3 Allen), 605; *McCulloch v. McC.* (1888), 5 Am. St. R., 96; *Long v. L.* (1877), 24 Am. R., 449. In Maryland it is a cause of divorce when the woman before marriage has been guilty of illicit carnal intercourse with another man, the same being unknown to the husband at the time of marriage, Revised Code of

But if there is an error *de persona*, i.e. if a person, thinking he is going to marry Rachel, is married to Leah, the marriage will be void.¹

Nor will the fact that either of the parties was led on to contract a marriage by the wiles of the relations of the other, who conspired to that end, avail to annul it so long as the party actually consented; for in that case, said Lord Stowell, "It would create some alarm if the Court were to lay it down that the good offices of a mother, an aunt, or an elder sister, so performed, were to be scrutinised with a severity that tended to call in question the validity of marriages so promoted."²

(b) *Insanity*

If a lunatic, "so found by inquisition," subsequently marries, the marriage is absolutely void;³ but even if there has been no inquisition, yet, if he or she can be proved to have been insane at the time of the marriage, the marriage will be void, for insanity is a ground of nullity.

No satisfactory definition of insanity can be laid down; but it may be described that it is not to be merely dulness, shyness, or nervousness, but such aberration as, however concealed, prevents the party from considering what they are doing.⁴

Drunkenness, further, may amount to lunacy, if it is so gross that the drunkard does not understand what he

Maryland, 1878, Act 51, s. 12. The Austrian Code, s. 58, also makes antenuptial pregnancy a cause of divorce. See Fraser, pp. 451-454.

¹ Ayliffe's *Parergon*, 362; and see Fraser on Husband and Wife, 2nd ed., 456. The patriarch Jacob was bound by subsequent ratification; see Gen. xxix.; see also Sanchez, lib. vii., disp. 18.

² *Sullivan v. Oldacre* (1818), 2 Hag. Con., 238, 247; *affid.* 3 Phillim., 45; and for criminal prosecutions for such a conspiracy, see *post*, Chap. XV.

³ The Marriage of Lunatics Act, 1811, 51 Geo. III, c. 37; *Turing, ex parte* (1812), 1 V. & B., 140; a sentence of the Court is unnecessary.

⁴ *Lord Durham v. Lady D.* (1885), 10 P. D., 80; *B. alias A. v. B.* (1891),

is doing, in the same way that drunkenness may avoid a contract;¹ but though it frequently has happened that persons, especially at the Fleet, married while drunk, and sometimes were made drunk for the purpose of being married contrary to their inclination,² in no reported English case has a marriage been set aside on the ground of the party being drunk at the time of the ceremony.

To marry a lunatic so found is a gross contempt of Court, and may be the subject of an information by the Attorney-General.

(c) *Nonage*³

The age of marriage has always been fixed at fourteen years for males and twelve years for females;⁴ still, if

27 L. R. Ir. 587; *Harrod v. H.* (1854), 1 K. & J., 4; and see *Turner v. Meyers* (1807), 1 Hag. Con., 414; *Mrs. Ash's case* (1702), 2 Free., 259.

¹ *Legeyt v. O'Brien* (1834), Milward, 325. See per Lord Stowell in *Sullivan v. Oldacre* (1818), 2 Hag. Con., 246; *Johnston v. Brown* (Nov. 15, 1823), 2 S., 495; *Scott v. Paquet* (1867), L. R., 1 P. C., 552; and *Synod Winton* (1308), Spelman, vol. i. 448; Sanchez, bk. i., disp. 8, No. 19; and see Chitty on Contracts, 12th ed., pp. 193 and 194.

² See *R. v. Thorp* (1695), 5 Mod., 218, 1 Com., 26; *Hill v. Turner* (1737), 1 Atk., 515.

³ In 1889 the mean age for marriage was 28·33 years for the man and 25·95 for the woman, the marriage rate for that year having risen (see *ante*, p. 20), and the mean age of marriage decreased. In this year three men married at sixteen, fifty-nine at seventeen, twelve at from eighty to eighty-five, four at over eighty-five; and twenty women married at fifteen, one hundred and sixty-seven at sixteen, and one from eighty to eighty-five years old; see Reg.-Gen.'s Report, 1889, pp. vi., xxxii., and 68-70. But in 1888 twenty-one women married at fifteen years, out of which two were only fourteen and one thirteen years old, while three married at eighty to eighty-five years; see Report for 1888. As to stating the exact age, see *post*, s. 4 (b), p. 80.

⁴ The age of capacity is uniform throughout the United Kingdom, see Commission on Marriage, 1868 [c. 4059], pp. 5, 27; under the Commonwealth the age was raised to fourteen and sixteen; see *ib.* For the age of marriage over the Continent, see Return showing the earliest Ages at which Marriages may be solemnised in European States, 1874 [c. 1096], lii. 781.

they marry under that age, but above seven years, that marriage is not void, but voidable; but either party, on attaining years of marriage, *i.e.* fourteen or twelve, may disagree from and avoid the marriage by an extra-judicial act. Still, it is laid down that a wife shall not have dower unless she be nine years old at the death of her husband; yet, *à converso*, however much above nine years old she may be, she shall have dower if her husband be four years old only; but in another place it was laid down that a marriage under seven is absolutely void.¹

Thus in an old case it was decided that a woman of full age, who had married a boy of twelve years old and had been bedded with him, was entitled to dower out of the husband's land on his dying soon after under age.²

As to the necessity of parents' consent to the marriage of their children under age, see *post*, pp. 42, 43, 51, and seq.

(d) *Relationship*³

The prohibited degrees are those contained in the table

¹ Co. Lit., 33b; *Grey's case* (1580), 3 Dy., 305b, 313a, b, 368b; *Blackden's case* (1611), Brownlow, pt. 2, p. 36; Bro. N. C., 5 M. 1, p. 151, s. 497, and pt. 2, p. 108; and see per Vaughan, C. J., in *Holder v. Dickeson* (1673), 1 Free., 95, at p. 97 and note (h); and *Ambrosia Gorge's case* (1598), 6 Co., 22a, 40b; and see Henry VIII's protest on attaining puberty against his marriage with Catherine of Arragon in 1504; the protest is dated June 27, 1505; see 1 St. Tr., 332; as he remarried Catherine in 1509, when king, and eighteen years old, this protest became irrelevant; see Oughton, tit. xciii.

² *Grey's case* (1580), 3 Dy., 368c.

³ For a list of books and papers on marriage between near kin, see Index Society, vol. iv., 1st App. to 1st Rep., the Index by A. H. Huth. In 1847 a Royal Commission was appointed to inquire into the operation of the law as to the prohibited degrees of marriage, and the Report declared that the existing law failed to check cohabitation, usually preceded but sometimes not by a ceremony between a widower and a deceased wife's sister; see the Report, Parl. Paper, 1847-8 [973]. For Canon Law of prohibited degree, see Chap. XVI, s. 3 (e) (l). For Ecclesiastical Practice, see the Clerk's Instructor in the Ecclesiastical Courts, chap. iv., pp. 332-351.

drawn up by Archbishop Parker and printed in the Book of Common Prayer.¹

This table includes a deceased wife's sister² and a deceased husband's brother. It was at one time thought (though this degree is included in the table) that a widower might marry his deceased wife's niece,³ but it was subsequently held to be prohibited.⁴ A man, however, may marry his great uncle's widow, and apparently his deceased wife's stepdaughter, also, if a widower or widow intermarry, their children by their prior spouses may marry. Likewise two brothers, or a father and son, can marry two sisters; and *è converso*, a widower can marry his deceased wife's brother's widow.

The prohibited degree include illegitimate relations,⁵ and relations by the half-blood.⁶ But sexual intercourse does not include affinity; so a marriage was held good notwithstanding that the husband had, previous to marriage, had connection with his wife's mother.⁷

¹ This regulation depends on several Acts of Henry VIII, in particular 32 Hen. VIII, c. 38; 28 Hen. VIII, c. 7, s. 7; and 28 Hen. VIII, c. 16, s. 2; it seems somewhat doubtful which of these statutes is in force, but the upshot is as above. See the statutes considered, *Wing v. Taylor* (1861), 2 Sw. & Tr., 278; *Brook v. B.* (1861), 9 H. L. C., 193; *R. v. Chadwick* (1847), 11 Q. B., 173; and see *ante*, pp. 7, 8.

² *R. v. Chadwick*, *ubi sup.*; *Hill v. Good* (1672), 1 Free., 72, 107, 141, 152, 167.

³ Co. Lit., 235*a*.

⁴ *Man's case* (1591), Cro. El., 228; *Wortesley's case* (1675), 1 Free., 287; *Denny v. Ashwell* (1717), 1 Str., 53; *Ellerton v. Gastrell* (1720), Com., 318; *R. v. Brighton* (1861), 1 B. & S., 447.

⁵ *Hains v. Jersel* (1696), 1 Ld. Raym., 68; *Horner v. H.* (1799), 1 Hag. Con., 337, at pp. 352, 353; *R. v. Chadwick*, *ubi sup.*; *R. v. Brighton* (1861), 1 B. & S., 447; *Woods v. W.* (1840), 2 Curt., 516, at p. 521.

⁶ *R. v. Brighton*, *ubi sup.*

⁷ *Wing v. Taylor* (1861), 2 Sw. & Tr., 278; by Canon Law this constituted an impediment, see Chap. XVI, s. 3 (*l*). Intercourse by a husband during marriage with his mother-in-law is incestuous adultery; see *post*, Chap. VII, s. 5 (*f*).

Formerly marriages within the prohibited degrees were not void, but only voidable by a suit during the life of both parties (which suit was instituted by any one with an interest, see Chap. VI, s. 2); and so if either party died before a suit was instituted, the marriage remained valid and the issue legitimate.¹ But the Marriage Act, 1835 (which applies to Ireland, see Chap. XIX, s. 2 (a), but not to Scotland, see Chap. XVIII, s. 4, or India),² made marriages between the prohibited degrees absolutely void.³ And this prohibition applies, if the parties are domiciled in England, whether the marriage takes place in England or in a country whose law permits such a marriage.⁴

The Marriage Act, 1835, validated marriages previous to August 31, 1835, between persons within the prohibited degrees of affinity, unless a suit was then pending or the marriage previously annulled.⁵

Besides these marriages being void, a person entering into a marriage within the prohibited degrees is liable to be proceeded against for incest in the Ecclesiastical Court, and sentenced to excommunication and penance;⁶ and it is the duty of the churchwardens and minister to present.⁷

¹ *Elliott v. Gurr* (1812), 2 Phillim., 16; and see *ante*, Chap. I, pp. 10, 11. So if a man married his sister, they were husband and wife till divorce. Vin. Abr., tit. Baron. & Feme, A; and see Bastard, A 2; but the marriage was not considered "lawful," see *Fenton v. Livingstone* (1859), 3 Macq. H. L., 497.

² *Des Merces v. Cones* (1864), 2 Hyde, 65; and see *Lopez v. L.* (1885). I. L. R., 12 Calc., 706.

³ 5 & 6 Will. IV, c. 54; *R. v. Chadwick* (1847), 11 Q. B., 173; and see *Andrews v. Ross* (1888), 14 P. D., 15; and *post*, Chap. VI; for the discussion on the Bill, see Hansard's Debates, 3rd series, vol. xxxviii., p. 203; vol. xl., pp. 792, 948.

⁴ *Brook v. B.* (1861), 9 II. L. C., 193; and see *Fenton v. Livingstone* (1859), 5 Jur. N. S., 1183; and *post*, Chap. XVII, s. 2 (b).

⁵ 5 & 6 Will. IV, c. 54; *Sherwood v. Ray* (1837), 1 Moo. P. C., 353.

⁶ *Blackmore v. Brider* (1816), 2 Phillim., 359; and see *post*, Chap. VII, s. 5 (b).

⁷ Canon 109, 113, and seq.

(e) *Prior Marriage existing*

A marriage when a former husband or wife is alive is null, as well by the Spiritual as by the Common Law, and they are not husband and wife *de facto*.¹ For polygamy and polyandry are forbidden by Christianity, and the law of England and every other civilised country;² and the law of England will not recognise a Mormon or polygamous marriage.³

So even though one spouse has been absent for twenty years, so that a marriage could not be punished for bigamy (see Chap. XV, s. 3), yet such second marriage, if at the date the first spouse was living, is void. And in such a case the remarried spouse and the returned absentee should mutually take in church a solemn vow of forgiveness and fidelity.⁴

As to the presumption of the death of the first spouse, who is absent at the time of the second marriage, and is never again heard of, see *post*, Chap. III, s. 4 (d).

But a previous promise or precontract to marry another person, which now cannot be enforced, creates no disability.⁵

¹ *Riddlesden v. Wogan* (1602), Cro. Eliz., 858; Vin. Abr., tit. Baron & Feme, A; Bastard, A 2 & F; and see *Bruce v. Burke* (1825), 2 Add., 471; *Miles v. Chilton* (1849), 6 N. of C., 636; *Birt v. Boutinez* (1868), L. R., 1 P. & M., 487; a decree of nullity after a bigamous marriage is common; see Dixon on Divorce, 2nd ed., pp. 322-24; and see *post*, Chap. III, s. 2 (e), 4 (d), and Chap. VI, s. 1. For the practice in the Ecclesiastical Court, see the Clerk's Instructor, chap. iv., pp. 351-368.

² Wharton's Conflict of Laws, 2nd ed., § 132; Sanchez, bk. vii., disp. 80.

³ *Re Bethell* (1888), 38 Ch. D., 220; *Hyde v. H.* (1866), L. R., 1 P. & M., 130; and see Chap. XVII, s. 2.

⁴ Burns, Parish Registers, p. 180, citing Bermondsey Parish Register, ann. 1604.

⁵ 4 Geo. IV, c. 76, s. 27, re-enacting 26 Geo. II, c. 33, s. 13; and as to previous legislature on precontracts, see 32 Hen. VIII, c. 38, in vol. i., Revised Statutes; and *Wing v. Taylor* (1861), 2 Sw. & Tr., 278; *Beauchey v. Brown* (1860), E. B. & E., 796; and see *ante*, Chap. I, pp. 8-10; and as to breach of promise of marriages, see Chap. XII.

Persons divorced¹ may marry again after the decree absolute, see *post*, Chap. VIII, s. 1 (b) (e), and Chap. XIII, s. 3 (b); but a clergyman can refuse to remarry the guilty respondent, see Chap. XIII, s. 3 (b) and App. 2.

A list of decrees absolute is kept at the Divorce Registry, Somerset House, arranged alphabetically year by year, which may be consulted on payment of a fee of two shillings and sixpence; and by searching there it may be ascertained whether or not the person is actually divorced and free to marry.

As to foreign divorces, see *post*, Chap. XVII, s. 4.

Lastly, a prior marriage is only an impediment to the validity of a subsequent marriage, if such prior marriage is valid; for if the prior marriage is actually void (see (b) (c) (d) and Chap. VI), or voidable (see (b) (f) and Chap. V), and a decree of nullity has been obtained, the subsequent marriage (even prior to such decree) will become valid.

(f) *Impotence*

Impotent persons may, if they please, marry;² but impotence is cause of nullity, making the marriage voidable but not void; see Chap. V, s. 1 (a) (c).

SEC. 3.—REQUIREMENTS OF FORM FOR MARRIAGE ACCORDING TO THE CHURCH OF ENGLAND³

(a) *Generally*

The form of marriage has been regulated by statutes dealing separately with marriages according to the Church

¹ In 1889, 150 divorced persons—75 men and 75 women—married, Reg.-Gen.'s Report for 1889, p. 7; as to the number of divorces (1887), there were 390 divorces granted, making 780 divorced persons, Parl. Paper, 1889, 80.

² *Hall v. Wright* (1858), E. B. & E., 746; *Cavell v. Prince* (1866), L. R., 1 Ex., 246.

³ The number of marriages according to the rites of the Church of

of England, and with Nonconformists' or Civil marriages ; as to which, see *post*, s. 4.

Some, however, of these provisions are merely directory, *i.e.* their breach or neglect does not render the marriage void, although the minister or official should insist on their observance, and in default of their observance can decline to proceed with the marriage, and the offending party may be besides liable to penalties.

Rule of Construction.—And as to this, there is a special rule of interpretation for statutes dealing with marriages. Previous to Lord Hardwicke's Act there had been no statutable nullity, *i.e.* no statute regarding marriages contained any clause directing the marriage to be null and void if certain rules were not complied with, although there were several statutes for regulation of marriage wherein punishment for disobediences was prescribed. Then Lord Hardwicke's Act, 26 Geo. II, c. 33, for preventing clandestine marriages, laid down by certain words certain statutable nullities, see *ante*, Chap. I, p. 12 ; and nullities were created by 4 Geo. IV, c. 76, s. 22, see p. 36. On the rules of interpreting this, Dr. Lushington laid down, that "there has never been a decision that any words in a statute, as to *marriage*, though prohibitory and negative, have been held to infer a nullity, unless that nullity was declared in the Act. That viewing the successive Marriage Acts, it appears that prohibitory words without a declaration of nullity were not considered by the Legislature as creating a nullity, and that this is a legislative interpretation of Acts relative to marriage . . . and not only is all legal presumption in favour of the validity and against the

England is by far the most numerous, being for the year 1889, 149,356 out of a total of 213,865, *i.e.* at the rate of 698 per 1000 ; see the Registrar-General's Report for 1889, pp. 6 and 30, table 5.

nullity of marriage,—as to that presumption, see *post*,—but it is so on this principle ; and a legislative enactment to annul a marriage *de facto* is a penal enactment, and not only penal to the parties, but highly penal to innocent offspring, and therefore to be construed according to the acknowledged rule most strictly.”¹

Presumption in favour of Marriage.—The presumption above referred to, which is most useful in cases where it is doubtful or difficult to prove that some of the necessary formalities, *e.g.* banns, have been complied with, has been laid down in two important cases by the House of Lords, as that when a marriage is proved to have been solemnised *de facto* by people who intended that it should be a good marriage, and it is done *bonâ fide* and openly, the maxim *omina rite esse acta* applies.²

The present general Act dealing with Church of England marriage is the Marriage Act, 1823,³ which provides a statutable nullity by enacting

“That if any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns or licence from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and wilfully consent to acquiesce in the solemnisation of such marriage by any person not being

¹ *Catterall v. Sweetman* (1845), 1 Rob., 304, 317, 580 ; *Campbell v. Corley* (1856), 28 L. T., O. S., 109. The same canon of interpretation obtains in the United States ; see *Encyclopædia Britannica*, tit. Marriage.

² The *Lauderdale Peerage* (1885), 10 App. Cas., 692 ; *Piers v. P.* (1849), 2 H. L. C., 331 ; and see *post*, Chap. III, s. 4 (a) (c), pp. 139, 142.

³ 4 Geo. IV, c. 76. The short title is given by 55 Vict., c. 10. The Marriage Act, 1823, s. 1, repeals and replaces Lord Hardwicke's Act, 26 Geo. II, c. 33. The present Act was framed by a Committee of the Lords, and moved by the Archbishop of Canterbury. Lord Campbell states that he assisted in passing it, and considered it quite perfect ; *Lives of the Chancellors*, vol. v., pp. 127, 128, n. See Walpole, *History of England from 1815*, vol. ii., p. 76 ; Hansard and the *Annual Register* for 1823.

in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.”¹

But this Act does not apply to Jews and Quakers,² or to marriages of the Royal Family,³ and only to England and Wales.⁴

The general scheme of the Legislature is to require for Church of England marriages a public ceremony according to the rubric in the Church, preceded either by banns or licence from bishop or archbishop, a special licence from the archbishop, or a registrar’s certificate. This Legislation requires to be considered in detail as follows:—

(b) *Banns*⁵

The Act of 1823 directs⁶ that

“All banns of matrimony shall be published in an audible manner in the parish church or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry wherein the parties may be married shall dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnisation of the marriage, during the time of morning service or of evening service (if there shall be no morning service in such church or chapel, upon the Sunday upon which such banns shall be so published), immediately after the morning lesson, or whensoever it shall happen that the parties to be married shall dwell in diverse parishes or chapelries; the banns shall in like manner be published in the church or in any such chapel as aforesaid belonging to such parish or chapelry wherein such parties shall dwell, and that all rules prescribed by the rubrick concerning the publication of banns . . . and not hereby altered, shall be duly observed;”

¹ S. 22.

² 4 Geo. IV, c. 76, s. 31; as to marriages of Quakers and Jews, see *post*, s. 4 (f).

³ *Ib.*, s. 30; as to these, see *post*, s. 6.

⁴ *Ib.*, s. 33; as to marriages abroad, see *post*, s. 5.

⁵ Marriages by banns are by far the most numerous; for out of 698 marriages (the rate per 1000 of those celebrated according to the rites of the Established Church, see *ante*, p. 34, n. 3), 632 are by banns; see the Registrar-General’s Report for 1889, pp. 6 and 30, table 5, *i.e.* of church marriages over ninety per cent. are after banns.

⁶ 4 Geo. IV, c. 76, s. 2.

And further creates a statutable nullity if persons willingly and wilfully intermarry without due publication of banns.¹ This leads us to consider what is due publication of banns.

Particulars to be given.—The clergyman can require the persons intending to be married to deliver to him, seven days before the first publication of banns, a notice in writing, dated, and giving the particulars of their names, house of residence in his parish, and the time they have lived in such a house.² This is not under oath, and a false statement of any of these particulars does not expose the parties to penalties. These particulars are to be inserted in a bann book “from which the banns are to be published.”³

But if the names are misstated in the publication with the knowledge of *both* parties, the marriage will be void. So where Edward Croxall Tongue, usually known as Croxall Tongue, and never as Edward Tongue, born in 1815, son of Edward Tongue, a gentleman of considerable landed property in Staffordshire, being at school at Keynshaw, became engaged to the schoolmaster's widowed sister, Mrs. Allen, aged thirty-five, and she put up the banns as of Edward Tongue and Mary Ann Allen, in February 1833, and they then intermarried, but he returned to school as a pupil and went home for the holidays alone, the wedding being kept a secret, the Court of Arches declared the marriage void; and this was affirmed by the Judicial Committee of the Privy Council. It was contended that the minor Tongue was ignorant of the misdescription; but as the parties were residing in the same house in daily intercourse, and it was deposed to by the sextoness that the banns were shown by her to the parties, and inquiry made if the description was correct,

¹ 4 Geo. IV, c. 76, s. 22.

² *Ib.*, s. 7.

³ *Ib.*, s. 6.

and further, the marriage was celebrated in the name of Edward, and he signed the register as Edward, both Courts held that the minor's knowledge of the misdescription must be assumed.¹

But where James Carpenter prevailed on Susannah Spencer to marry him, and told her he would see the banns properly published, and afterwards informed her that they had been published, she taking no steps in the matter, and he had the banns published in the names of James Carpenter and Agnes Watts, which latter name she had never borne, and during the service the clergyman addressed her as Agnes, till which time she believed she was going to be married in her own name, and she did not know until after the marriage that the banns had been published in a wrong name, the Court of King's Bench upheld the marriage.²

But as parties sometimes change their baptismal or true name and acquire others by repute, it is sufficient if their banns are published in the name they are best known by ; and if the original name is lost and a new name acquired, putting up the banns in the original name with a fraudulent intention will amount to an undue publication, and void the marriage.³ But if knowledge of the misnomer can only be brought home to one of the parties, the marriage will be valid.⁴

¹ *Tongue v. Allen* (1835), 1 Curt. Ec., 38 ; 1 Moore P. C. C., 90 ; and see *Midgley v. Wood* (1860), 30 L. J., P. & M., p. 57, where Bower Woods had his banns published as John Wood ; and *Wiltshire v. Prince* (1830), 3 Hag. Ec., 332 ; *Orme v. Holloway* (1847), 5 N. of C., 267.

² *R. v. Wroxtton* (1833), 4 B. & Ad., 640 ; and see *Wright v. Elwood* (1837), 1 Curt. 49 and 662, and *Gompertz v. Kensit* (1872), L. R., 13 Eq., 369, where the wife requested the husband to put up the banns and left it entirely to him, and he for brevity's sake left out one Christian name of hers ; but the marriage was upheld.

³ *Tooth v. Barrow* (1854), 1 Spinks, Ec. & Ad., 371.

⁴ *Gompertz v. Kensit*, *ubi sup.* ; *Templeton v. Tyree*, *ubi sup.* ; *Wright v. Elwood*, *ubi sup.*

As usually one only of the parties is active in putting up the banns by giving in the notice in writing (see *ante*, p. 38), or otherwise communicating with and instructing the clergyman or parish clerk, it is somewhat difficult to bring home knowledge of the misnomer to the other party; but where the party putting up the banns has knowingly misstated, not only her own, but also the other party's name, the said other party, by hearing him or herself misdescribed at the marriage ceremony, and answering and signing the register in the wrong name, thereby adopts the fraud.¹

If the party putting up the banns misstates in fact the name of the other party, but believing such misstated name to be the true name, still such marriage will be valid, notwithstanding the other party knew of the misdescription, for there was no common and privy purpose.² If the party putting up the banns misstates only his or her own name, proof of common fraud and purpose is, of course, more difficult. However, where the party putting up the banns misstated his own name, on a concerted plan arranged with his intended father-in-law in the presence of the intended wife, in order to conceal the marriage from his own father, it was held that knowledge of the undue publication was brought home to both, and the marriage was therefore declared void.³

As to the fraudulent purpose of the misdescription, although it is not necessary that there should be positive and direct proof that the false publication was with a

¹ *Orme v. Holloway*, *ubi sup.*, *Tongue v. Allen* (1837), 1 Moore P. C., 90; but in *Gompertz v. Kensit*, *ubi sup.*, this evidence of knowledge by the other party of the misdescription was disregarded; and see *R. v. Kay* (1887), 16 Cox C. C., 292.

² *Wright v. Elwood*, *ubi sup.*; *R. v. Kay*.

³ *Brealy v. Reed* (1841), 2 Curt., 833.

view to fraud, there must be some evidence of concert between the parties.¹

If there is no parent or guardian having a right to dissent, it has been questioned whether a marriage could be declared void on account of the banns being proclaimed in wrong names.²

A misdescription of status, as of a widow or a married woman being described as a spinster, is immaterial; neither the Act of Parliament nor the rubric require a description of the status of the parties.³

As to a misdescription of the parties' residence, not only does s. 7 (previously cited, p. 38) direct that the parties shall declare their place of abode, but further, s. 2 directs that the banns shall be published in the parish church or chapel in which the parties dwell, or if they dwell in diverse parishes, then in each parish; but this is merely directory, for s. 26 expressly provides that after solemnisation of marriage, under publication of banns, evidence to prove that the parties had not resided shall not be received in any suit touching the validity of such marriage. However, a clergyman who puts up banns of parties not residing in his parish is liable to ecclesiastical censures, amounting to three years' suspension,⁴ and in addition to the penalties under s. 21 of the Marriage Act, 1823, 4 Geo. IV, c. 76.

¹ *Orme v. Holloway* (1847), 5 N. of C., 267.

² *Holmes v. Simmons* (1868), L. R., 1 P. & M., 523, p. 530.

³ *Wright v. Elwood* (1829), 2 Hag. Ec., 598; *Wright v. Elwood* (1837), 1 Curt., 662; in this case the woman was described as a spinster, whereas her first husband died between the publication of the banns and the marriage; and see *Mayhew v. Mayhew* (1812), 3 M. & S., 266, note.

⁴ Canon 62; and see *Wynn v. Davies* (1835), 1 Curt., 69; *Foysey v. Martin*, reported in Stephen's Book of Common Prayer, vol. iii., p. 1548; and see *post*, pp. 42, 43.

If the parties live in an extra-parochial place, they are to be married in the next adjoining parish.¹

As to person having no place of residence properly so-called, such as canal-boat persons and seafaring men, by Canon Law a traveller is a parishioner of every parish he comes to,² and it must be remembered that the necessary period of residence is only fifteen days for the three Sundays of publication, in addition to the seven days' notice if required by the parson.

But if one of the parties is resident in Scotland, a publication in Scotland is sufficient.³

As to marriage of minors⁴ by banns, the consent of the parents is presumed in the absence of dissent.⁵

And it is provided that no person shall be punishable for marrying minors without consent of parents or guardian, unless such parent or guardian shall publicly forbid the banns, when the publication shall be void.⁶

Nevertheless it is the clergyman's duty to make the proper inquiries. He has a right to make such inquiries as to age and residence; and in default of doing so, if he marries a ward of Court, he may be guilty of contempt, and punishable therefor.⁷

¹ See 4 Geo. IV, c. 76, s. 12; and see *post*, p. 44.

² Lyndwood, bk. 3, tit. 115c, *Altissimus v. Peregrinates*; and see Wheatly on the Common Prayer, Matrimony, sec. 1, pp. 340 and 341.

³ The Marriages Validity Act, 1886, 49 & 50 Vict., c. 3.

⁴ As to the number of persons marrying under age, the Registrar-General's Report for 1889 states that in that year the proportion was, out of every 1000 persons marrying 260 were minors, *i.e.* 61 men and 199 women; see pp. vii. and xxxii., table 7.

⁵ Per Lord Hardwicke in *ex parte Birchell* (1754), 3 Atk., 812; and per Lord Stowell in *Dildear v. Faucit* (1821), 3 Phillim., 580, 581.

⁶ 4 Geo. IV, c. 76, s. 8; apparently this overrules Canon 62, forbidding a parson to marry a minor unless the parents have signified their consent; and see Canons 100 and 104.

⁷ Per Lord Eldon, L. C., in *Priestley v. Lamb* (1801), 6 Ves., 421; *Nicholson v. Squire* (1809), 16 Ves., 259 a; and see *Warter v. Yorke*

The parents or guardian can prevent such marriage by forbidding it publicly, see above ; probably an illegitimate parent (who has no right to “consent” to a marriage by licence, see *post*, p. 52) cannot forbid banns. But strangers, such as churchwardens, cannot forbid the banns on the grounds that the parties are poor, and may become a charge to the parish.¹ As to fees, see *post* (h), p. 77.

Publication.—As to the place of publication, not only must it be in the parish church or chapel belonging to such parish or chapelry wherein the parties dwell respectively, but it must be “in the *parish church, or some public chapel in which banns of matrimony may now, or may hereafter, be lawfully published.*”²

As to old parish churches and public chapels in which banns can be published as of old right without any authorisation, see *post* (f), p. 59.

New parishes can be created under the Church Building Acts, 1818–84,³ or by a special Act of Parliament, private or public.

Further, the bishop may, on certain conditions, and under various powers given by several Acts, licence chapels for marriage, either in case of a public chapel with a chapelry annexed, or in the case of a chapel in an extra-parochial place,⁴ or in a chapel without a chapelry

(1815), 19 Ves., 451 ; and see a proceeding against a clergyman, the Rev. G. Martin, in 1843, reported in notes to Stephen's Book of Common Prayer, vol. iii., p. 1548 ; and see *ante*, p. 41.

¹ Wheatly's Common Prayer, Marriage, sec. 1, p. 340 ; persuading paupers to marry is not an indictable offence, *R. v. Seward* (1834), 1 A. & E., 706.

² 4 Geo. IV, c. 76, s. 2.

³ See a list of them in second schedule to 55 Vict., c. 10 ; and see *Tuckness v. Alexander* (1863), 9 Jur. N. S., 1026 ; *Fuller v. Alford* (1883), 10 Q. B. D., 418.

⁴ 4 Geo. IV, c. 76, ss. 3, 4, and 5 ; and 20 Vict., c. 19, ss. 9, 10.

annexed, but on assigning a district.¹ But under these Acts one of the parties must be resident in the parish or district. There must be written up in the interior of the chapel, "Banns may be published and marriages solemnised in this chapel."²

Still parties have an option to be married in the parish church.³

As to extra-parochial places, they are to be deemed to belong to next adjoining parish,⁴ or there may be a chapel therein licensed by the bishop as above, or under 20 Vict., c. 19, and 23 & 24 Vict., c. 24.

But the legislation or the division of parishes is somewhat intricate, and is not here further set out.⁵

Where the church is under repair, the parishioners may be married and banns published in an adjoining church, or in a place in the parish licensed by the bishop for divine service.⁶

As to the manner of publication, the Act of Parliament declares that they should be published immediately after the second lesson, although the old rubric declared that after the Nicene Creed, before the sentences for the offertory, during the communion service, was the proper time.⁷

¹ 6 & 7 Will. IV, c. 85, ss. 26-34; 7 Will. IV, and 1 Vict., c. 22, ss. 32-34; *R. v. Perry* (1861), 3 E. & E., 640.

² 4 Geo. IV, c. 76, s. 4; 6 & 7 Will. IV, c. 85, s. 29; 7 Will. IV, and 1 Vict., c. 22, s. 33.

³ 6 & 7 Will. IV, c. 85, s. 31.

⁴ 4 Geo. IV, c. 76, s. 12.

⁵ See also Index to Statutes, tit. Ecclesiastical Commission, 4, Division of Parishes; Index to London Gazette, 1830-83, tit. Ecclesiastical Parishes.

⁶ 4 Geo. IV, c. 76, s. 13; 5 Geo. IV, c. 32; 11 Geo. IV, and 1 Will. IV, c. 18; and see *R. v. Cresswell* (1876), 1 Q. B. D., 446, deciding that where under such circumstances divine services had been several times performed by the minister in a private room, it was presumed that such place was properly licensed; and see *post*, Chap. III, s. 4, p. 142.

⁷ See Phillimore's Ecclesiastical Law, vol. i., p. 760.

The Act 4 Geo. IV, c. 76, s. 2, also declared that the publication is to be during morning service; but that if there is no morning service, then at evening service.

And as to the number of times of publication, it must be on three Sundays preceding the marriage. Further, the Act enjoins the observance of all rules prescribed by the rubric concerning the publication of banns not thereby altered.¹

At the publication of the banns of a minor, the parent or guardian can publicly declare his dissent in the church to the marriage, and then the publication is void; and see *ante*, pp. 42, 44.

If the marriage does not take place within three months after the complete publication, then there must be re-publication for three Sundays.²

Lastly, after the publication of banns, the marriage must be solemnised in one of the parish churches in which the banns were published, and in no other place;³ as to the form of marriage, see *post* (*f*), p. 58 and seq.

By way of penalty on the clergyman it is enacted,⁴ that a person knowingly and wilfully solemnising marriage without due publication of the banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same, is guilty of felony, and shall be transported as a felon for fourteen years.

¹ The form prescribed by the rubric is: "I publish the banns of marriage between . . . in the parish . . . and of . . . this parish (or both of this parish). If any of you know of any cause or just impediment why these two persons should not be joined in holy matrimony, ye are to declare it. This is the first (second or third) time of asking."

² 4 Geo. IV, c. 76, s. 9; and see *R. v. Clarke* (1867), 10 Cox's C. C., 474.

³ *Ib.*, s. 2, and see *post*, p. 63.

⁴ *Ib.*, s. 21; see Chap. XV.

If the parties marry without any banns at all, the marriage will still be good, unless it was omitted wilfully.¹

Further, where a ceremony of marriage has taken place, prior publication of banns will be presumed even in bigamy.²

(c) *Licence*³

Marriage may be by the licence of the archbishop, bishop, or ordinary. For from early days, by Canon Law, bishops were accustomed to grant these licences, and their rights in that behalf is recognised and confirmed by 25 Hen. VIII, c. 21, s. 9, in all cases in which they were wont to issue dispensations, such dispensation not being contrary to law; and they are now governed by Canons of 1603, Nos. 101–104, and 4 Geo. IV, c. 76, ss. 10, 11, 14, 15, 16, 17, 18.⁴

Such licences are issued by the bishops through their chancellors or surrogates, or by the Archbishop of Canterbury⁵ for any place in his province through his Vicars-General.⁶

¹ *Wright v. Elwood* (1837), 1 Curt., 662; *Templeton v. Tyree* (1872), L. R., 2 P. & M., 420; *Greaves v. Greaves* (1872), L. R., 2 P. & M., 423; but see opinion given in Report of Royal Commission on Marriage Law, 1868 [4059], at p. x.

² *R. v. Allison* (1806), R. & R., 109; and Chap. III and Chap. XV.

³ Marriages by licence are not so numerous as by banns; for out of 698 marriages (the number per 1000, according to the rites of the Established Church), but 48 were by licence. The Registrar-General's Report for 1889, pp. vi. and xxx., table 5.

⁴ And see, too, 6 & 7 Will. IV, c. 85, s. 1.

⁵ The Archbishop of York can only issue licences for marriages in his diocese.

⁶ The following is a reprint of the official notice issued by the Archbishop of Canterbury's Vicar-General, from whose office the licence can be obtained for anywhere throughout the southern province, including London:—

The surrogate must take an oath before he can grant licences.¹ A licence cannot be granted for marriage

“ARCHBISHOP OF CANTERBURY’S LICENCES FOR MARRIAGE

THE

VICAR-GENERAL’S OFFICE

is removed from Bell Yard to 5 Dean’s Court, Doctors’ Common, E.C.
(*First floor.*) (*Immediately opposite the Deanery.*)

MARRIAGE LICENCES

Issued from this Office are available for London and throughout the whole Province of Canterbury

Applications for Marriage Licences must be made in the Registry, by one of the parties to be married ; and no other application, either verbal or in writing, can be received as instructions for a Marriage Licence.

No Agent will be allowed to interfere in any manner whatsoever in obtaining or procuring a Marriage Licence, or paying for the same.

Affidavits for Marriage Licences are prepared from the instructions of one of the parties to be married *personally* appearing in the Registry, and The Licence is to be delivered to the party upon payment of the sum of Thirty Shillings over and above the amount paid for Stamps.

Fees and Charges for the Affidavit and Licence,	£1 10 0
Stamps,	0 12 6
	<u>£2 2 6</u>

By order of the
ARCHBISHOP OF CANTERBURY.

NOTE.—By the 4th George IV, c. 76, it is enacted that, in order to avoid fraud and collusion in obtaining Licences for Marriage, before any such Licence be granted, one of the parties shall make an affidavit, *on oath, that there is no legal impediment to the intending marriage ; and also that one of such parties hath had his or her usual place of abode, for the space of fifteen days immediately preceding the issuing of the Licence, within the boundary or district assigned to the parish church or the district parish in the church of which the Marriage is to be solemnised.*

VICAR-GENERAL’S OFFICE,

5 Dean’s Court, Doctors’ Commons, E. C.

Office Hours, 10 to 4. Saturdays, 10 to 2.

Holidays—Good Friday, Christmas Day, and Bank Holidays.”

¹ 4 Geo. IV, c. 76, s. 18.

outside the district, diocese, or province from whose office the licence is issued, for the archbishop or bishop would have no jurisdiction; but if so issued, the marriage following thereon will not be invalid unless both parties knowingly and wilfully so intermarry.¹

The issue of licences is discretionary, and a matter of grace and favour, so the ordinary or surrogate may refuse it, although there is no legal impediment.

So where the Prince of Capua, brother of the King of the Two Sicilies, applied for a licence to marry Miss Penelope Smith, and the Count de Ludolf, Envoy Extraordinary and Minister Plenipotentiary of the King of the Two Sicilies entered a caveat, and the cause came on to be heard in the Court of the Faculties, the licence was refused by Dr. Nicholl, Master of the Faculties, though no legal impediment existed, because the issue of the licence was a matter of discretion.² And at the present day, in the diocese of Lichfield, it is the practice not to grant licences for the remarriage of divorced persons; see App. 2.

Residence.—No licence can be granted unless there has been a residence for fifteen days by *one* of the parties to be married in the parish where the marriage is to be celebrated. Such a residence, although it need not be continuous, must be *bonâ fide*; and though living at an hotel or lodging is sufficient, the merely hiring a room and only living in it one day, or not living there, will not satisfy the statute.³ But if a licence is granted in due form for a marriage in a particular church, the

¹ *Dormer v. Williams* (1838), 1 Curt., 870; *Balfour v. Carpenter* (1810), 1 Phillim., 204.

² *The Prince of Capua v. the Count of Ludolf* (1836), 30 L. J. & M., 71, n.; see App. 2.

³ 4 Geo. IV, c. 76, s. 10; but in the office of the vicar-general of the Archbishop of Canterbury it is the practice to relax the requirements of residence in favour of sailors returning from a voyage and wishing to

incumbent is under no obligation to inquire whether there has been a sufficient residence to justify the granting of the licence. His proper course is to assume the regularity of the licence, and solemnise the marriage.¹

Affidavit.—Before the licence is granted, one of the parties to be married must swear before the surrogate that there is no lawful impediment of kindred, and that there has been fifteen days' residence; and if either party is a minor, and not previously married, then that the consent of the parent or guardian has been obtained.²

This is usually put in the form of affidavit;³ but if the be instantly married. For illustrations of laxity of practice, the canons being habitually disregarded previous to Lord Hardwicke's Act, see *More v. M.* (1741), 2 Atk., 157.

¹ *Tuckness v. Alexander* (1863), 2 Dr. & Sm., 614.

² 4 Geo. IV, c. 76, s. 14. The oath making applicant need not necessarily be the resident party, so long as the applicant can swear to such other parties' residence.

³ The form of the affidavit used in the office of the Vicar-General of the Archbishop of Canterbury is as follows:—

“VICAR-GENERAL'S OFFICE, }

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Appeared Personally
of the

of

and prayed a Licence for the Solemnisation of Matrimony in
the Church of

between h and of the

and made oath that he believeth that there is no impediment of Kindred or Alliance, or of any other lawful Cause, nor any suit commenced in any Ecclesiastical Court to bar or hinder the Proceeding of the said Matrimony, according to the Tenor of such Licence. And he further made Oath, that he the said

hath had of usual place of Abode within the said

for the space of Fifteen Days last past

Sworn before me,

.”

It is the practice of this office to enter the original affidavits in books year by year; these books are from time to time, as the office space becomes filled up, removed to Lambeth Palace Library. The author

defendant swears falsely it is not perjury, and only misdemeanour,¹ and the Spiritual Court has no jurisdiction to punish for such false oath.² There is a fee payable, varying from £2 to £3, or even £4, see *post*, p. 77 (in the province of Canterbury the fee is £2, 2s. 6d., see *ante*, pp. 46 n. 6, 47), but no caution or security by bond need be now given by the applicant.³

A caveat may be entered against the grant of the licence; and if so, the licence is not to be issued until the caveat is withdrawn, and the judge has certified to the registrar that he has examined into the matter of the caveat, and that he is satisfied that it ought not to obstruct the grant of the licence.⁴ As, however, there is little or no interval of time between the application for the grant of a licence (in the Vicar-General's Office, in Doctors' Commons, the licence is issued at once; from a commissary it is sent by return of post after the personal application) and no necessary interval between the grant of the licence and the marriage, the best way is to enter a caveat beforehand, *ex majore cautela*, as is the practice in the office of the Vicar-General of the Archbishop of Canterbury, where a book is kept for the purpose.

The form of the licence is given below.⁵

derived much information and was given these forms by Sir J. Hassard, K.B., principal registrar of the province and diocese of Canterbury, whom he hereby thanks.

¹ *R. v. Chapman* (1849), 1 Den., 432.

² *Phillimore v. Machon* (1876), 1 P. D., 481.

³ 4 Geo. IV, c. 76, s. 15, thus abolishing the provision of Canons 101, 102, as to taking security.

⁴ 4 Geo. IV, c. 76, s. 11; the parent of an illegitimate child who had no right to consent cannot enter a caveat and oppose, see p. 52, n. 3.

⁵ "EDWARD WHITE, by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, to our well-beloved in Christ,

Grace and Health. Whereas ye are, as it is alleged, resolved to proceed

Particulars of the licences granted are, according to the practice of the Vicar-General of the Archbishop of Canterbury, entered day by day in books, but there is no index.

At the marriage the licence should be produced to, and retained by, the solemnising clergyman, as it is his authority for marrying without banns.

If the parties marry without licence, the licence being only issued after the marriage took place, still the marriage will be valid unless *both* parties knew at the time of the ceremony there was no licence.¹

to the Solemnisation of true and lawful Matrimony

and that you greatly desire that the same may be solemnised in the Face of the Church: We being willing that these your honest Desires may the more speedily obtain a due Effect, and to the end therefore that this Marriage may be publicly and lawfully solemnised in the Church of

by the Rector, Vicar, or Curate thereof, without the Publication or Proclamation of the Banns of Matrimony, provided there shall appear no Impediment of Kindred or Alliance, or of any other lawful Cause, nor any suit commenced in any Ecclesiastical Court, to bar or hinder the Proceeding of the said Matrimony, according to the tenor of this Licence: And likewise, That the Celebration of this Marriage be had and done publicly in the aforesaid Church

between the Hours of Eight in the forenoon and Three in the afternoon. We, for lawful Causes, graciously grant this our Licence and Faculty, as well to you the Parties contracting, as to the Rector, Vicar, Curate, or Minister of the aforesaid who is

designed to solemnise the Marriage between you, in the Manner and Form above specified, according to the Rites of the Book of Common Prayer, set forth for that purpose, by the Authority of Parliament.—Given under the seal of Our Vicar-General this

Day of in the Year of our Lord One Thousand Eight Hundred and Ninety-one and of our Translation the Eighth.

VICAR-GENERAL'S OFFICE,

No. 5 Dean's Court, Doctors' Commons.

By Stat. 4 Geo. IV, c. 76, this Licence to continue in force only Three Months from the date hereof."

¹ *Greaves v. Greaves* (1872), L. R., 2 P. & M., 423.

Consent of Parents.—As to marriage of minors¹ by licence, the Act directs that unless the minor is a widow or a widower, the consent of the person whose consent is required must be obtained.²

The persons to consent are the father,³ if living (unless he has been deprived of his parental rights; as to when this can be done, see Chap. XIV, s. 1 (c)); or if he is dead, then the guardian lawfully appointed (as to appointment of guardians, see Chap. XIV, s. 3 (a)); or if there are no guardians, then the mother³ (the mother is now necessarily a joint guardian, see *post*, Chap. XIV, s. 3 (a)); if unmarried; or if there be no mother, then the guardians appointed by the Court of Chancery, whose consent is expressly made requisite unless there is no person authorised to give consent.⁴

If the father is *non compos mentis*; or the guardian or mother *non compos mentis* or beyond the seas, or unreasonably, and for undue motives, refuse their consent, the parties desiring to marry can apply to the Court of Chancery, which is empowered to declare the marriage proper; and such judicial declaration takes the place of the consent by the father, guardian, or mother.⁵ But the declaration by the Court can only supply the father's consent when such father is actually *non compos*, and not

¹ As to proportion of marriages by minors, see *ante*, p. 42, n. 4.

² 4 Geo. IV, c. 76, s. 14; see, too, Canons 62 and 100-104.

³ This means the legitimate father or mother. In the case of illegitimate minor (unless a guardian has been appointed by the Court, see Chap. XIV, s. 3 (a)), there is no person authorised to give consent, and the minor in swearing this can obtain a licence of his own will, 4 Geo. IV, c. 76, s. 14, the natural father or mother having no right to obstruct. Under Lord Hardwicke's Act, 26 Geo. II, c. 33, s. 11, marriage of illegitimate minor by licence with the consent of his natural parents, but without the consent of a guardian appointed by the Court of Chancery, was absolutely void; *Droney v. Archer* (1815), 2 Phillim., 327; see *ante*, p. 15.

⁴ 4 Geo. IV, c. 76, s. 16.

⁵ 4 Geo. IV, c. 76, s. 17; see *Blake v. B.* (1772), 2 Dick., 459.

when he is beyond the seas or refuses.¹ If there is no person having authority to consent, the minor on swearing this can obtain a licence without consent.²

The consent need not be formal and in writing, but it may be implied and presumed from surrounding circumstances, but once given is presumed to continue, although it may be subsequently retracted; but if so, such dissent must be unequivocally expressed.³ But if the father after consenting dies before the marriage takes place, the consent of the guardian or the Court must be obtained.⁴

But this point as to the consent of parents is now less important; for, as regards the obtaining of the licence, the practice in the office of the Vicar-General of the Archbishop of Canterbury is to accept the oath of the party applying that the consent of the minor's parents has been obtained, without any other evidence of consent unless such minor is under sixteen years of age; if the minor is under sixteen, then a letter from such minor's parent or guardian must be produced, although it is believed that in other diocesan registries and among some surrogates it is the practice to require further evidence of the parents' consent than the oath of the parties.

Further, the provision of the Act requiring the obtaining such consent is merely directory; and if, either by swearing falsely that the minor is of age, or that a consent, not in fact given, has been obtained, or in any other way a licence is obtained without the parents' consent for the marriage of a minor, and such marriage takes place, the marriage is valid.⁵

¹ *Ex parte I. C.* (1838), 3 My. & Cr., 471.

² 4 Geo. IV, c. 76, s. 14, and see p. 52, n. 3.

³ *Hodgkinson v. Wilkie* (1795), 1 Hag. Con., 262; *Balfour v. Carpenter* (1811), 1 Phillim., 221; *Smith v. Huson* (1811), 1 *ib.*, p. 287.

⁴ *Ex parte Reibey* (1843) 12 L. J. Ch., 436.

⁵ *R. v. Birmingham* (1828), 8 B. & C., 29; as to the marriage to

But in case such a valid marriage of a minor without consent of parents, whether after licence of banns, takes place by a false oath or a fraud of the party, such party so offending may be deprived of all benefits under the marriage, the Court being empowered to declare a forfeiture of all such offending party's interests, and to settle it on the innocent party or the issue; but if both parties are guilty, the settlement is to be for the issue, with provisions for maintenance of the offending parties, but with regard to the benefit of the issue during the life of the parents of the offending parties. Such forfeiture to be prosecuted by way of information by the Attorney-General at the relation of the parent or guardian whose consent was not given, within three months after such parent or guardian is cognisant of the marriage; and the information must be filed within a year after the marriage. The forfeiture and settlement pronounced by the Court on such information is to override any previous settlement by the parties, which is declared absolutely void.¹

The parent or guardian can prevent the issue of a licence for a minor's marriage by the entering of a caveat; as to how this is done, see *ante*, p. 50. Further, even if the licence has been issued, information conveyed to the

Nonconformists, it is specially enacted that the absence of consent does not invalidate; see *post*, p. 81. Under Lord Hardwicke's Act absence of consent of parents was a ground of nullity, see *ante*, pp. 14, 15. As to the Canon Law on the necessity of consent of parents which varied, see *Hodgkinson v. Wilkie* (1795), 1 Hag. Con., 262, n.

¹ 4 Geo. IV, c. 76, ss. 23-25; and see *A. G. v. Clements* (1871), L. R., 12 Eq., 32; *A. G. v. Read*, *ib.*, p. 38; *A. G. v. Lucas* (1848), 2 Phill., 753; *A. G. v. Mullay* (1828), 4 Russ., 329; *A. G. v. Mullay* (1844), 7 Beav., 351. By an early statute, 4 & 5 P. and M., c. 8, a woman marrying between twelve and sixteen without consent forfeited her lands to the benefit of the next of kin; see *Hanbury v. Lord Bateman* (1740), 2 Atk., 63; *Ridley v. Wilson* (1749), Amb., 73; and this statute was not repealed till 1829 by 9 Geo. IV, c. 31; this was independent of proceedings in Chancery; see *post*, Chap. XIV, s. 3 (b).

clergyman that the licence has been wrongly obtained would justify such clergyman in refusing to marry; see *post* (f), p. 59.

If the minor is a ward of Chancery, the approval of Court, even though the minor's parents may be alive and consenting, should be obtained; for in default of such approval the party marrying the ward will be in contempt, and liable to punishment by way of committal. But this jurisdiction of the Court over its ward is entirely independent of and apart from the Marriage Acts, and is not here further treated of; but see also *post*, Chap. XIV, s. 3 (b).

Further, it is a frequent clause in a will and settlement that a minor marrying without consent shall forfeit all benefits thereunder, see *ante*, p. 19; but the absence of such consent in no way affects the validity of the marriage, and the granting of and presumption of such consent is dealt with on different principles.

False Names.—As to a licence in a false name, a wilful, fraudulent misdescription in the licence known to both parties, such as if occurring in banns would have invalidated the marriage, will not invalidate a marriage following such misdescriptive licence, for in a licence identity is the main object.¹

For in a case where a Liverpool omnibus conductor persuaded Margaret Lea Bevan, who had been suffering under a disappointment, but was the daughter of a gentleman of means and position, to marry him, and she, with a view of concealing the marriage, allowed him to get the licence as for Margaret Bevan, and her address was further misdescribed and the parties were thereafter married, but they never cohabited nor consummated, still the full Court upheld the marriage.¹ However, if a licence pro-

¹ *Bevan v. M'Mahon* (1861), 30 L. J., P. & M., 61; and *Lane v. Goodwin* (1843), 3 G. & D., 610; and see *Clowes v. Jones* (1842), 3 Curt., 185.

cured for one person is transferred to another, that might be such a fraud as would invalidate.¹

Marriage after Licence.—Whenever a marriage shall not be had for three months after the grant of the licence, no minister shall proceed to solemnise such marriage until a new licence shall have been obtained or banns published.²

The marriage must take place in the church of the parish of residence mentioned in the licence as required.³ But when an actual marriage ceremony has been performed and proved, the Courts, even in bigamy, will presume that a licence was issued.⁴

(d) *Special Licence*⁵

The power of the Archbishop of Canterbury to grant special licences to marry, vested in him by 25 Hen. VIII, c. 21, ss. 2, 3, on the abolition of papal supremacy, is specially preserved by 4 Geo. IV, c. 76, s. 20.⁶ This power extends all over England. The Bishop of Sodor and Man has also, it appears, power to grant special licences within his diocese.⁷

The special licence must be applied for on affidavit at

¹ *Cope v. Burt* (1809), 1 Hag.'s Con. Reports, 434; approved, *Bevan v. M'Mahon*, *ubi sup.*

² 4 Geo. IV, c. 76, s. 19.

³ 4 Geo. IV, c. 76, s. 10. Previous to Lord Hardwicke's Act it was usual to insert in the licence three churches as competent wherein to solemnise the marriage; see *More v. More* (1741), 2 Atk., 157.

⁴ *R. v. Allison* (1806), R. & R., 109; and see Chap. III, s. 4.

⁵ There are no recent statistics as to the number of special licences issued, but the Report of Commissioners on the Marriage Laws, Parl. Paper, 1867-68 [c. 4059], states that on the average about twelve per annum are issued, *ib.*, p. vii.

⁶ See, too, 6 & 7 Will. IV, c. 85, s. 1; and see *Doe dem Egremont v. Grazebrook* (1843), 3 G. & D., 331.

⁷ *Piers v. P.* (1819), 2 H. L. C., 331; here the grant of a special licence was presumed,

the Vicar-General's Office, but it is issued from the Faculty Office, 23 Knightrider Street.

Special licences are granted as of course, but on payment, to peers, peeresses in their own right and their children, dowager peeresses, baronets and their eldest sons, judges, knights, members of Parliament, and on good cause shown to other persons at the discretion of the Archbishop. But in all cases a fee of about £30 is payable.

A special licence can authorise marriage without residence at any hour of the day or night, and in any place, whether consecrated or not. There is no limit of time within which the marriage must take place;—in one instance, owing to continued illness, the marriage was not solemnised till two years after the special licence was issued.¹

A form of the special licence is given in the note.²

¹ This information was kindly communicated to the author by Sir John Hassard, K.B., principal registrar of the province and diocese of Canterbury, and by Mr. W. P. Moore, registrar of the Court of Faculties, and their officials.

² “EDWARD WHITE, by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, by Authority of Parliament lawfully empowered for the purposes herein written, To our beloved in Christ,



Names,
Parishes, etc.,
of the parties.

Clause of consent if either party is a minor.

Health. Whereas, as it is alleged, ye have purposed to proceed to the solemnisation of a true, pure, and lawful marriage,

earnestly desiring the same to be solemnised with all the speed that may be: That such your reasonable desires may more readily take due effect, We for certain causes Us hereunto especially moving do so far as in Us lies, and the Laws of this Realm allow, by these presents graciously give and grant our Licence and Faculty, as well to you the parties contracting as to all Christian People

(e) *Registrar's Certificate*¹

Lastly, persons can be married in church on a registrar's certificate.²

(f) *Solemnisation of the Marriage*

The marriage must be solemnised within three months after the last publication of banns or grant of the licence. See *ante*, pp. 45, 56.

A clergyman refusing to marry after licence and (it would seem) banns, can be proceeded against in the Spiritual Court;³ for on the licence being produced to the clergyman, directing him to marry the persons in his church, his canonical obedience requires him to perform that marriage according to that licence;⁴ but there appears much doubt whether he can be civilly sued at law⁵ or

This is the old form, seldom used now; they are now usually made out for a particular church, and between certain hours, and in some special cases for a private dwelling-house.

willing to be present at the solemnisation of the said marriage, to celebrate and solemnise such marriage between you the said contracting parties, *at any time and in any Church or Chapel, or other meet and convenient place, by any Bishop* of this Realm, or by the Rector, Vicar, Curate, or Chaplain of such Church or Chapel, or by any other Minister in Holy Orders of the Church of England, provided there be no lawful let or impediment to hinder the said Marriage.—Given under the Seal of our Office of Faculties, at Doctors' Commons, this _____ day of _____, in the year of our Lord One thousand eight hundred and _____, and in the _____ year of our Translation."

¹ Out of 698 marriages (that being the proportion per 1000 of marriages according to the rites of the Established Church), sixteen were by superintendent-registrar's certificate. Registrar-General's Report for 1889, pp. vi. and xxx., table 5.

² 6 & 7 Will. IV, c. 85, s. 1; 7 Will. IV, and 1 Vict., c. 22, s. 36; and see *post*, pp. 80, 85, as to how certificate is obtained. See also pp. 88, 94.

³ *Argar v. Holdsworth* (1758), 2 Lee, 515.

⁴ *Tuckness v. Alexander* (1863), 2 Dr. & Sm., 614.

⁵ *Davis v. Bluck* (1841), 1 Q. B., 900.

indicted criminally.¹ As to divorced persons, the Divorce Act, 20 & 21 Vict., c. 85, by ss. 57, 58, enables the clergyman to refuse to marry them, but in such case he must allow some other person to marry them; see *post*, Chap. XIII, s. 3 (*b*), and App. 2. Further, if a clergyman perceives some irregularity or misdescription or fraud in the banns or licence, he may, nay, it is his duty, to refuse to proceed.²

Place of Marriage.—As to the place, the Act of 1823³ creates a statutable nullity if any persons “knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by such special licence as aforesaid.” Marriage after special licence can be solemnised in any chapel, or even an unconsecrated place or private room; but the real test whether marriage can take place in any particular church or chapel is, “Can banns be published there?” for an ordinary marriage licence gives no right to marry in any church in which banns cannot be published.

This leads to the inquiry as to where banns can be published.

And a church or chapel is authorised for publication of banns either by immemorial and ancient use, or by some special authorisation, as by private Act of Parliament, or by being constituted into a district parish or chapelry, or by licence of the bishop. These latter special authorisations are, so far as is material, discussed (*ante*, p. 43)

¹ *R. v. James* (1850), 3 C. & K., 167.

² *Sullivan v. Oldacre* (1818), 2 Hag. Con., 238, p. 253; *Argar v. Holdsworth*, *ubi sup.*; but such clergyman so refusing acts at his peril, for the responsibility for ascertaining the truth of the matters leading to the licence is on the ordinary; *Tuckness v. Alexander*, *ubi sup.*

³ 4 Geo. IV, c. 76, s. 22, re-enacting 26 Geo. II, c. 33, s. 8, as to which see note, p. 13.

under Publication of Banns. It is proposed here to show how and in what right, in the absence of any such special authorisation, banns can be published and marriage solemnised in a church or chapel.

The old Marriage Act of 1753, Lord Hardwicke's Act, authorised marriages and publication of banns in the parish church, or in some public chapel where banns have been usually published.¹ So all the parish churches existing and being parish churches in 1753 are authorised; this will include generally all ancient parish churches. It further authorised banns and marriages in a place not being a parish church, but a public chapel where banns have been usually published. So in the case of the Chapel Royal in the Tower of London, where a register of marriages was produced going back to and continuing from 1578, and a bann book beginning in 1754, in which year a bann book was first required by statute, Lord Ellenborough laid down that the evidence raised a *primâ facie* presumption that banns were previously published; and in the absence of evidence rebutting the presumption that the chapel was one in which banns might be solemnised,² so any public chapel with a bann book going back to 1754 may be taken to be one in which banns and marriages are authorised.

But this enactment only authorised banns and marriages in a public chapel existing at the date of the Act 1753; so where a person was married in Buerlyhill Chapel, "erected in 1765 and then duly consecrated, and in which divine service had been publicly and regularly celebrated ever since, and wherein banns of marriage had been often published and marriages celebrated previous to the

¹ 26 Geo. II, c. 33, ss. 1, 8; see *ante*, pp. 12 and seq.

² *Tuunton v. Wyborn* (1809), 2 Camp., 297.

marriage in question," still the marriage was declared void.¹

In consequence of this decision various Acts were passed, the last of which validates all marriages previous to August 23, 1808, solemnised in any public consecrated chapel;² and a later Act validated such marriages down to 1830, and even although the consecration of such chapel might be doubtful;³ but none of these Acts authorised future marriage in such chapel.

But another Act,⁴ besides validating authorised future marriages in church or chapel erected since 26 Geo. II, c. 33 (*i.e.* 1753), and consecrated, in which it has been customary and usual previous to the passing of the Act (July 5, 1825) to solemnise marriages, and all marriages hereafter solemnised therein shall be now valid in law.

To sum up, therefore, marriages may take place—

1st. In all parish churches existing at or prior to 1753.

2nd. In all public chapels where banns were usually published in 1753, it being taken to be presumptive *prima facie* evidence of such usual publication that there exists a register of marriages solemnised in such chapel dating back prior to 1753, and a bann book commencing in 1754.

3rd. In all consecrated churches or chapels erected since 1753, in which at and prior to July 5, 1825, it was customary and usual to solemnise marriages. It is presumed that a continuous and regular register of marriages not by special licence would be evidence of such usual and customary solemnisation.

¹ *R. v. Northfield* (1781), 2 Douglas, 658.

² 21 Geo. III, c. 53; 44 Geo. III, c. 77; 48 Geo. III, c. 127.

³ The Marriage Confirmation Act, 1830, 11 Geo. IV, and 1 Will. IV, c. 18.

⁴ 6 Geo. IV, c. 92; and see *R. v. Bowen* (1846), 2 C. & K., 227.

As to licensing new churches for marriages, see *ante*, p. 43. As to marriages in cathedrals, see *post*, App. 1.

But marriage in a vestry is taken as being a marriage in a church.¹

As to when a church is under repair, see *ante*, p. 44. In practice, however, it frequently occurs that marriages are celebrated in churches or chapels not authorised therefor; in consequence of which it has become a constitutional parliamentary usage to pass almost annually Acts to confirm and validate such marriages.²

A special licence may entitle the parties to marry in a church not authorised in that behalf, or unconsecrated, or in a private room; but of late years the practice has always been to specify in the special licence that the marriage should be in a church, or at least in a consecrated chapel or building in which divine service is habitually said, or in a gentleman's private chapel; see pp. 57, 58, n.

And by way of penalty on the clergyman it is enacted,³ "That if any person shall solemnise matrimony in any other than in a church or such public chapel wherein banns may be lawfully published . . . unless by special licence from the Archbishop of Canterbury . . . every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be deemed and adjudged guilty of felony, and shall be transported for the space of fourteen years, according to the laws in force for transportation of felons; provided that all prosecutions for such felony shall be commenced within the space of three years after the offence is committed."

¹ *Wing v. Taylor* (1861), 2 Sw. & Tr., 278.

² See Index to Statutes, App. XI; and see a general Act validating marriages down to 1851, 14 & 15 Vict., c. 97, s. 25.

³ 4 Geo. IV, c. 76, s. 21; under similar section in 26 Geo. IV, c. 33, the minister of the Savoy was indicted; see per Lord Mansfield, C. J., in *R. v. Northfield* (1781), 2 Douglas, 658; and see 54 & 55 Vict., c. 69, s. 1, and *post*, Chap. XV.

It is also alleged, although with little exact authority, that marriages may be solemnised in ambassadors' chapels, *i.e.* the chapel of a foreign ambassador accredited to Her Majesty is in a consulate ; but this would appear doubtful if one, or, still more, if both the parties were not of the ambassador's country, particularly if they were both domiciled British subjects.¹ The validity of such marriage would depend entirely on the principles of international law, *i.e.* the extent to which the law of England, which recognises international law, would recognise such marriage as valid, because and if it conformed to the principles of international law. Such a marriage could not be valid according to the English Marriage Acts, except in the almost impossible case that the ambassador's chapel of the consulate, etc., was licensed for marriages by the bishop (see *ante*), or registered as a Nonconformist place of worship under the Marriage Act, 1836, see *post*, s. 4 (*d*), p. 88. Except in such case banns could not be published, nor could a bishop's licence be granted for marriage there ; and "no notice by civil process can be given of, no superintendent-registrar can issue a licence or certificate for, and no registrar of marriages can attend, a marriage at the chapel of a foreign ambassador, or at a foreign consulate, in England, unless any such building should ever by any chance be registered in the ordinary way for marriage."²

Lastly, the marriage must take place, if after banns, in one of the places where such banns have been published, and in no other place ;³ or if after licence, in the place

¹ *Pertreis v. Tondear* (1790), 1 Hag. Con., 136 ; and Marriage Commission, 1868 [c. 4059], p. xxxviii. ; and see *post*, Chap. XVII, s. 6.

² Kindly communicated to the author from the General Register Office, Somerset House, July 13, 1892, by E. Whitaker, chief clerk.

³ 4 Geo. IV, c. 76, s. 2 ; and if the parties are not "both of the parish," then "not without a certificate of the banns being thrice

therein specified.¹ But this provision is not enforced by any statutable nullity; and so where the church was under repair and the banns had been published in an adjoining parish, but the marriage was solemnised in the church under repair, it was held good; and the judge observed that if banns were published at York, and the parties came to London and married there (the whole proceeding being *bonâ fide*), he would not say that it would be void.²

Time of Marriage.—It must be solemnised between the hours of eight o'clock in the forenoon and three in the afternoon,³ unless it is by special licence, see *ante*, p. 56; and a person wilfully solemnising marriage without such hours is guilty of felony, and punishable by fourteen years' penal servitude;⁴ but the Act does not expressly invalidate by a statutable nullity marriages celebrated outside these hours, and so according to the canon of construction above quoted (p. 35) they are (it seems) valid.

As to the time of year, marriage, it appears, may be solemnised at any time. Still, according to the Romish Canon Law, at certain times of the year marriage cannot be celebrated without dispensations.⁵ But it seems

asked from the curate of the other parish;" see the rubrick of the marriage service. See also *ante*, p. 45.

¹ See 4 Geo. IV, c. 76, s. 10; see *ante*, p. 56.

² *Stallwood v. Tredger* (1815), 2 Phillim., 287; and see *Catterall v. Sweetman* (1845), 1 Rob. Ec., 304; as to licensing another place while the church is under repair, see *ante*, p. 44.

³ 49 & 50 Vict. c. 14, thus repealing 4 Geo. IV, c. 76, s. 21, and overruling Canons 62 and 102 of 1603. The object of this canon was that the parties should not be drunk when going to be married; see *Synod Winton*, 1308, Spelman, 448, where, too, it is enjoined that they should be fasting.

⁴ 4 Geo. IV, c. 76, s. 21, and see the Penal Servitude Act, 1891, 54 & 55 Vict., c. 69, s. 1.

⁵ The rule was first laid down in the rescript of Clement III, "Capellanus," c. x. 2. 9. 4. But the exact period of prohibited times is somewhat undefined, and has been further altered by the Council of Trent; see Sanchez, lib. 7, disp. 7.

uncertain how far this prohibition ever obtained in England ; there is no constitution on it or notice thereon except a gloss in Lyndwood ;¹ this is cited in Gibson,² who states that after the Reformation the question arose as to marriage at prohibited times. But the Protestant Ayliffe³ observes that, admitting that banns are never published in Lent, yet by licence marriages are then solemnised, "but as for the time of Advent, which was never observed in our Church as a fast, there is no foundation for such a prohibition with us" . . and "Easter and Whitsun weeks are usually times of mirth and jollity, therefore marriages at those times ought not to be forbidden, and they are not with us." And the reason of this prohibition at fasting season is, that "even those who have wives ought at those times to be as those who have none, and therefore those who have none ought not then to change the condition."⁴ As a matter of fact, since 1838 up till the end of April 1889, it has been invariable that most marriages have taken place in the last quarter of the year, October, November, December, and the fewest in the first quarter, January, February, March.⁵

¹ Lib. iv., tit. 3, p. 274, n. (i), specifying from the first Sunday in Advent till the octaves of Epiphany exclusive ; from Septuagesima Sunday till the first Sunday after Easter inclusive ; from the first day of Rogations to the seventh day after the Feast of Pentecost inclusive ; but other authorities give different seasons.

² P. 430.

³ Pp. 364, 365 ; and see Wheatly, Rational Illustration of the Book of Common Prayer, note to the form for solemnisation of marriage, p. 342, alleging that Lent is the only prohibited season, and then only for marriages by banns ; and see A. J. Stephen's notes to the Book of Common Prayer, vol. iii., notes at pp. 1554-56 ; and see verses on prohibited times mentioned in registers, Burn's Parish Registers, p. 158.

⁴ Wheatly on Common Prayer, sec. 1 ; and see Sanchez, bk. ix., disp. 12, 15 ; and see *post*, Chap. IV, s. 1 (b), p. 170.

⁵ Registrar-General's Report for 1889, p. xxix., table 4.

It must be solemnised according to the statute in the presence of two or more credible witnesses besides the minister who shall celebrate the same;¹ but the presence of only one witness will not make the marriage void.²

Service.—The marriage must be solemnised, both at Common Law³ and by statute,⁴ by a clergyman in orders, who must not be the bridegroom.⁵

As to marriages by sham clergymen, it is the law that if a person not in orders has been inducted as rector or vicar into a benefice, all marriages solemnised by him as parson *de facto* are good, notwithstanding that he may be subsequently deprived *quia mere laicus*.⁶ And, further, as to marriages by a person ostensibly in orders, and acting as a curate or *locum tenens*, or if beneficed outside his parish, it appears to be the more accepted and correcter opinion that such marriage would be valid unless the parties knew or suspected that the seeming minister was an impostor.⁷

Any person, falsely pretending to be in holy orders, who shall solemnise marriage according to the rites of the Church of England, knowingly and wilfully so offending, shall be guilty of felony, and shall receive fourteen years' penal servitude, the prosecution to be commenced in three years after the offence.⁸

¹ 4 Geo. IV, c. 76, s. 28; the same was also prescribed by the canon, see *post*, pp. 68, 75.

² *Wing v. Taylor* (1861), 2 Sw. & Tr., 278.

³ *R. v. Millis* (1844), 10 Cl. & F., 534.

⁴ 4 Geo. IV, c. 76, ss. 21, 22.

⁵ *Beamish v. B.* (1861), 9 H. L. C., 274.

⁶ *Costard v. Winder* (1590), Cro. Eliz., 775.

⁷ The authority of this is Lord Stowell's dicta in *Hawke v. Corri* (1820), 2 Hag. Con., 280, p. 288.

⁸ 4 Geo. IV, c. 76, s. 21; 54 & 55 Vict., c. 69; and see *post*, Chap. XV; and see the prosecution of G. F. W. Ellis, who, by means of forged letters of ordination, became inducted, in 1883, Rector of Wetheringsett with Brockford, Stonham, Suffolk, and after, in the course of three or four

A deacon can solemnise matrimony.¹ At the solemnisation the Act declares that all the rules prescribed by the rubrick concerning the solemnisation of marriage and not thereby altered should be duly observed.² It thus becomes material to see what is the rubrick, and the Canons of the Church of England, and the words of the service in the Book of Common Prayer and prescribed by statutes, canon and rubrick to be followed, and what part of it is essential.³

Canon 62 orders that marriage shall be “in the time of divine service,”⁴ but there is no regulation as to at what time of service it should be celebrated; but Bishop Wren—and this is the most correct view—lays down that it should be after morning service.

The rubrick directs that “at the day and time appointed for solemnisation of matrimony, the persons to be married shall come into the body⁵ of the church with their friends

years’ incumbency, celebrating several marriages, was convicted therefor; *R. v. Ellis* (1888), 16 Cox’s C. C., 469, and see 51 & 52 Vict., c. 28.

¹ Watson, chap. xiv., p. 146; and see the reasons given by Lord Lyndhurst, L. C., in *R. v. Millis* (1844), 10 Cl. & F., 534, pp. 859, 860.

² 4 Geo. IV, c. 76, s. 2; and see 6 & 7 Will. IV, c. 85, s. 1.

³ See the origin of the marriage service and rubrick considered and explained by Willes, J., delivering opinions of the judges to the House of Lords in *Beamish v. B.* (1861), 9 H. L. C., 274; p. 325 and seq., where it is stated the two oldest forms of service are the uses of Sarum and York, agreeing in substance but differing in detail, which are to be found in Selden’s *Uxon Ebraica* and Palmer’s *Origines Liturgicæ*.

⁴ However, this is now almost universally disregarded; see Wheatly on Common Prayer, sec. 2; Hammick on Marriage, pp. 99, 213.

⁵ *I.e.*, the nave; later in the service they go into the choir, see *post*, p. 74; in ancient times a great part of the service was performed at the church door. Originally marriages were at the church door, and there the bride was endowed with *dos ad ostium ecclesiæ*; but the rubrick was altered at the time of the Reformation; see Wheatly’s notes to the Book of Common Prayer, Form of Solemnisation of Marriage, sec. 2, p. 344; and see *post*, p. 70, n. 2.

and neighbours;¹ and there standing together, the man on the right hand,² and the women on the left, the priest shall say,"—and here follows the preface explaining the object and duties of marriage; and then comes the charge, first to the congregation and then in more solemn words to the persons to be married, to disclose impediments.³ The rubrick then prescribes that if an impediment is alleged, the person making it must give security to prove his allegations, but meanwhile the ceremony must be deferred.

In default of any impediment being alleged, there then follows the "espousal;"⁴ the minister asking each party in turn, first the husband and then the wife, "Will thou have this man (or woman) to be thy wedded husband (or wife), to live together after God's ordinance in the holy estate of matrimony?" and then expounding the respective duties of husband and wife, so that each party may mutually consent; for without consent there is no marriage, and the enumeration of the duties is to tell each to what they respectively consent.

The respective duties of husband and wife so explained are, that he should "love her, comfort her." She should "obey him, serve him, love him;" their mutual duties are, "honour and keep her (or him) in sickness or in health;

¹ This is probably a survival of the bridemen or paranympths in use among the Jews; see Wheatly on the Book of Common Prayer, Marriage, sec. 2, s. 3, p. 344. A. J. Stephens on Common Prayer, notes, pp. 1, 556. Now by 4 Geo. IV, c. 76, s. 28, two credible witnesses must be present, see *post*, p. 75.

² *I.e.*, of the woman. The positions are thus, because the right is the more honourable place, and which in all Christian Churches is assigned to the man as being the head of the wife.

³ As to what are the impediments, see *ante*, p. 23 and seq.

⁴ These declarations of consent are the remains of the old form of espousal, *i.e.*, a present consent to a future marriage, and so is couched in the future tense, as opposed to the plighting of the troth in the present tense, "I do take;" see Wheatly on the Common Prayer, Marriage, sec. 4.

and forsaking all other, keep thee only to her (or him), so long as ye both shall live."

Each party having respectfully signified their consent by saying¹ "I will," the minister asks, "Who giveth this woman to be married to this man?"²

After this the parties plight their troth, the rubrick saying, "Then shall they give their troth to each other in this manner. The minister, receiving at her father's or friend's hands, shall cause the man with his right hand to take the woman by her right hand, and to say¹ after him as followeth."

The words³ of the stipulation which the man then repeats after the minister run in the Prayer Book: "I *M.* take⁴ thee *N.* to my wedded wife, to have and to hold from this day forward, for better for worse,⁵ for richer for poorer, in sickness and in health, to love and to cherish, till death us do part, according to God's holy ordinance;⁶ and thereto I plight thee my troth."

¹ "It has never been held that the actual repetition of the words of the marriage service is necessary. I have certainly known cases of complete marriages, where perhaps it was improper that the marriage should be celebrated, in which the parties, being of the poorer classes, have wilfully abstained from making the responses, especially that of obedience on the part of the woman," per Wood, V. C., *Harrod v. H.* (1854), 1 K. & J. 4.

² "The want of a person to give away the bride is not visited by the rubrick or by the general law with any consequences," per Willes, J., delivering opinion of all the judges to the House of Lords, *Beamish v. B.* (1866), 9 H. L. C., 274, pp. 330, 331. The person to give away the bride should be the parent, or in default, a guardian or near relation. But Lord Hardwicke, L. C., committed for contempt a person who "gave away" a ward of Court; *More v. M.* (1741), 2 Atk., 157.

³ These words were always, even in pre-Reformation times, said in English. For form of words in a marriage by proxy, see App. 4, and see *ante*, p. 22.

⁴ These are *verba de presenti*.

⁵ The York Manual, used in the northern province previous to the Reformation, here inserted, "for fairer, for fouler."

⁶ The office of Sarum used in the south province had in lieu of the

The rubrick then proceeds—

“Then shall they loose their hands; and the woman, with her right hand taking the man by his right hand, shall likewise say after the minister;” and the Prayer Book words are: “I *N.* take thee *M.* to be my wedded husband, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love, cherish, and to obey,¹ till death us do part, according to God’s holy ordinance; and thereto I give thee my troth.” When these words have been said by the wife the marriage is knit between husband and wife; “the subsequent giving of the ring, and joining of hands, and publication of the fact of marriage by the minister, are in their nature, and are stated to be, symbolical and declaratory of a marriage which has already taken place by the consent of the parties. The blessing is as of persons who have already consented together in wedlock; and anciently, as well in English as abroad, the nuptial benediction was given only at a first marriage. The rest of the service consists of thanksgiving, exhortation, and prayer. But it is neither wise nor right to leave out any part of the service. Still the omission of the giving of the ring and the subsequent part of the ceremony may . . . be considered for civil purposes non-essential.”²

words, “according to God’s holy ordinance,” the words, “if holy Church will it permit.”

¹ Instead of the words “to love, cherish, and to obey,” the office of Sarum ran, “to be bonair and buxom in bedde and at borde.”

² Per Willes, J., delivering the answer of all the judges to the House of Lords, *Beamish v. B.* (1861), 9 H. L. C., 274, at pp. 329-331. “Anciently up to this point the marriages were celebrated at the door of the church *ad ostium ecclesiæ*. The parties then entered the church, and after the thanksgiving and prayer the Eucharist was celebrated, and the solemn benediction given;” and see *ante*, p. 67, n. 5.

The rubrick continues : "Then shall they again loose their hands ; and the man shall give unto the woman a ring,¹ laying the same upon the book with the accustomed duty to the priest² and clerk. And the priest, taking

¹ The omission of the giving of the ring may be considered for civil purposes non-essential, per Willes, J., delivering opinions of judges, 1 *Beamish v. B.* (1861), 9 H. L. C., 274, p. 329 ; and see *Weld v. Chamberlaine* (1684), 2 Shower (300), 307. The giving of the ring was in reality part of the ceremony of espousals (p. 68) as opposed to marriage ; and the former rubrick ran, "and other tokens of spousage as gold and silver." But the use of the ring in marriage is very ancient, obtaining in pre-Christian times among Romans and Jews. In the order of Sarum there was formal benediction of the ring by two solemn prayers, after which it was sprinkled with holy water. At the Reformation the Puritan ministers objected to the enjoining of the use of the ring as tending to superstition ; but the bishops declared that it was only of human institution always given as a token and a pledge of fidelity and constant love, see the subsequent prayer ; and the reasons mentioned by the Roman ritualists are not given in the Common Prayer Book. The metal of the ring is immaterial ; see generally as to the ring, Swinburne on Spousals, sec. 15, and see Hudibras thereon ; and see History, etc., of Wedding Ring, by Maskell ; and see Hooker's Ecclesiastical Polity, bk. 5, sec. 73.

² As to marriage fees, a canon of Archbishop Layton, given in Lyndwood, p. 278, declares, "We do firmly enjoin that no sacrament of the Church shall be denied (or delayed) to any one upon account of any sum of money, nor shall matrimony be hindered therefor ; because if anything hath been accustomed to be given by the pious devotion of the faithful, we will that justice be done thereupon to the churches by the ordinary of the place afterward." It appears, therefore, to be the law of the Church that notwithstanding the husband omits or refuses to pay the due, still the minister must proceed with the service, and for recovering the dues have recourse to a subsequent legal proceeding, which, if for a sum under £10, must be before two justices, see 4 & 5 Vict., c. 36, and Acts there referred to ; and if above £10, in the Ecclesiastical Court. But marriage fees are not due of common right ; but by immemorial custom in a parish a reasonable fee may be due there. In three cases, as in parish of Elinton, Derby, *Thompson v. Davenport* (1701) ; Lutwyche, 1059, Birmingham (1740, circa), 1 Lee, 387, 398 ; South Petherton, Somerset, *Patten v. Castleman* (1753), 1 Lee, 387, the parson sued in the Ecclesiastical Court for marriage fees, relying on a custom that a female inhabitant marrying by licence out of the parish should pay by

the ring, shall deliver it unto the man, to put it upon the fourth finger of the woman's left hand.¹ And the man holding the ring there, and taught by the priest, shall say."

The Prayer Book words to be then said by the man run : "With this ring I thee wed,² with my body I thee worship,³ and with all my worldly goods I thee endow : In the name of the Father, and of the Son, and of the Holy Ghost.⁴ Amen."

their husband at the marriage, or soon after, five shillings ; but in the two former cases the Court of Common Pleas gave a prohibition, on the ground the custom was unreasonable ; and in the third case Sir George Lee, the ecclesiastical judge, in a suit brought for a fee on a like custom, declared the custom unreasonable both by Ecclesiastical and Common Law, as no fee could be due where no service was done. In a recent case a custom was set up in the parish of Horton, Bucks, to pay thirteen shillings for every marriage by banns in the parish church ; but the Exchequer Chamber held the fee too large, and, therefore, the custom bad, *Bryant v. Foot* (1868), L. R., 3 Q. B., 497. The right to receive such marriage fees (if due) is saved by 6 & 7 Will. IV, c. 86, s. 49 ; and when parishes are divided, provision is made for apportionment and distribution of fees. But this will not create a right if not previously existing, or validate an unreasonable and therefore illegal custom, see *post*, p. 77. The actual laying on the book is nearly obsolete. Hooker speaks of this custom as "in a manner already worn out," Ecclesiastical Polity, bk. 5, sec. 73.

¹ The rubrick in the usage of Sarum explained that the reason of the ring being put on the fourth finger of the left hand was that a particular vein proceeds thence to the heart. This, though once believed, is now contradicted.

² In the first Prayer Book of Ed. VI there here were inserted, "This gold and silver I thee give," at the repetition of which words it was customary to give the woman a purse of money ; see Cardwell's two liturgies ; Wheatly on Common Prayer Book, Matrimony, sec. 5 ; and see 2 Bl. Com., 134.

³ The use of this word was objected to by the Puritan ministers ; but it was explained by James I that it only signified honour, and at the restoration of Charles II it was promised to be altered thereto. And so this signified that the wife was not a concubine, but shared her husband's rank ; see Hooker, Ecclesiastical Polity.

⁴ These words were objected to by the Puritan ministers as seeming to favour those who count matrimony a sacrament, which

The rubrick continues: "Then the man leaving the ring upon the fourth finger of the woman's left hand, the minister shall say,"—and here follows the prayer for a blessing, not on the ring, as in the Romish Church, but on the parties.

After which the rubrick directs: "Then shall the priest join their right hands together, and say," in the words of the Prayer Book, the ratification, "Those whom God hath joined together let no man put asunder;" and the rubrick enjoins, "Then shall the minister speak unto the people," the publication and proclamation running in the Prayer Book—

"Forasmuch as *M.* and *N.* have consented together in holy wedlock, and have witnessed the same before God and this company, and thereto have given and pledged their troth either to other, and have declared the same by giving and receiving of a ring, and by joining of hands; I pronounce that they be man and wife together in the name of the Father, and of the Son, and of the Holy Ghost.¹ Amen."

Then follows the blessing, which is a very ancient form, appearing in the Sarum and York manuals.² After signification the bishop disclaimed; justifying these as solemn words of ratification, as in wills and other solemn and weighty Acts, documents, or oaths. See Wheatly and Stephens on the Common Prayer, Matrimony.

¹ This rubrick, and the ratification and publication, is very ancient, and perhaps peculiar to the Church of England. "It is observable that the authors of this form appear to have carefully avoided the style, *ego vos conjungo*, adopted at the Council of Trent," per Willes, J., delivering the opinion of the judges to the House of Lords in *Beumish v. B.* (1861), 9 H. L. C., 274, p. 329, citing Palmer's *Origines Liturgicæ*. In fact the words of the priest, "I join you in marriage," are of quite recent origin; see Addis and Arnold's *Catholic Dictionary*, Marriage. In the first Prayer Book of Edward VI, in lieu of the words, "of a ring," there stood "gold and silver."

² Palmer's *Origines Liturgicæ*; in the Romish Church the blessing was not to be said over a second or reiterated marriage; see

this the rubrick directs, "Then the minister or clerks, going to the Lord's Table, shall say or sing this psalm following." Then follow two alternate psalms, and the rubrick continues: "The psalm ended, and the man and the woman kneeling before the Lord's Table, the priest standing at the table, and turning his face towards them, shall say."¹ Then follow certain prayers and a blessing.

Then the rubrick directs: "After which, if there be no sermon declaring the duties of husband and wife, the minister shall read as followeth,"²—and the Prayer Book address explains the duties of married life. This finished, the concluding rubrick runs: "It is convenient that the new-married persons should receive Holy Communion at the time of their marriage, or at the first opportunity after their marriage."³ Further, in the usage of York,

Corpus Juri Canonici, C., lib. iv., tit. 21, de secundis nuptiis, "Capellanum" and "Vir autem." The present rubrick of the Romish Church permits the nuptial benediction, except when the woman has been married before.

¹ In the first Prayer Book of Edward VI, the first rubrick ran: "Then they shall go into the choir, and the ministers and clerks shall say," etc. The Puritan ministers objected to the change of position mentioned in the two rubricks; to which the bishop answered, "They go to the Lord's Table because the communion is to follow." The rubrick enjoining Communion is now altered (see *infra*, n. 3), but the advance to the rails is still maintained.

² The rubrick of the first Prayer Book of Edward VI ran: "Then shall be said after the Gospel a sermon, wherein ordinarily (so often as there is any marriage) the office of man and wife shall be declared according to Holy Scripture. Or, if there be no sermon, the minister," etc. The Prayer Book of 1552 ran: "Then shall begin the communion, and after the Gospel shall be said a sermon," etc. The intent of both these forms of the rubrick were alike to enjoin the Communion service, the obligation in which respect is now abolished. When the Communion is said with the marriage service, it begins here after the blessing and before the exhortation.

³ The former rubrick in both the Prayer Books of Edward VI ran: "The new-married persons (the same day of their marriage) must receive the Holy Communion;" but the former rubrick was altered,

the rubrick ran, that after the mass the man shall receive the pax from the priest, and then the husband shall kiss the wife; and no one else shall kiss her, or she any one else; but this rubrick was omitted at the Reformation. And in both the usages of York and Sarum there was an office for the priest coming that night into the marriage chamber to bless it and the bed, and sprinkle holy water.¹ But the usage still exists to sing the marriage Psalm cxxviii. on the first Sunday of the couple's appearance in church.² The marriage must be celebrated in the presence of two or more credible witnesses.³

(g) *Registration* ⁴

The marriage, after the service, must be registered and the positive requirement to receive Communion the same day abolished to oblige the Puritans, who alleged, firstly, that it compelled persons to come to the Lord's Table though they felt themselves unprepared, or else to forbear marriage; and, secondly, that marriage festivals were accompanied with divertisements unsuitable to the Christian duties that should precede and follow the receiving that holy sacrament. Further, in pre-Reformation times it was laid down that the new-married couple should abstain from each other two or three days in honour of the benediction; yet the non-observance of this precept is not officially declared a sin; Johnson's Eccles. Law, A.D. 1843, sec. 11, n. (g); Lyndwood, note, 276; (g), on Archbishop Strafford's Constitution, based on "Aliter legitimum," "Nostrates," and "Sponsus et Sponsa," c. 1, 3, 5, C. xxx. q. 5. In the Church of England the observance of this rule is obsolete, and rightly, for marriage is not a sacrament, see Article XXV; if, however, as is now sometimes done, the Communion is actually administered with or on the day of marriage, the reason of the prohibition will still apply; and see *post*, Chap. IV, s. 1 (b), p. 170, n. 4.

¹ See A. J. Stephen's Book of Common Prayer, vol. iii., pp. 1622, 1623, where the form of the office is given. The usages of York and Sarum may be consulted in Selden's *Uxor Ebraica*. The marriage bed of Prince Arthur and Catharine of Arragon was blessed; see 1 St. Tr., 326.

² Burn's Parish Registers, p. 158, n. (2).

³ 4 Geo. IV, c. 76, s. 28; but this is merely directory, and a marriage in the presence of one witness is valid; *Wing v. Taylor* (1861), 2 Sw. & Tr., 278. The presence of witnesses is also a canonical and rubrickal requirement, see *ante*, p. 68.

⁴ And see *post*, Chap. III, s. 3.

according to the Births and Deaths Registration Act, 1836, which provides that the Registrar-General shall furnish to every rector, etc., of every church in England marriage register books and forms for certified copies ;¹ and—

“That every clergyman, immediately after every office of marriage solemnised by him, shall register in duplicate, in two of the marriage register books, the several particulars relating to that marriage according to the form of the said schedule (c),² . . . and every such entry . . . shall be signed by the clergyman . . . and by the parties married . . . and by two witnesses ;”³ and “it shall be lawful for every clergyman of the Church of England who shall solemnise any marriage in England . . . to ask of the parties married the several particulars herein required to be registered touching such marriage ;”⁴ and “that every person who shall wilfully make or cause to be made, for the purpose of being inserted in any register of . . . marriage, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty of perjury.”⁵

If the clergyman refuses, or without reasonable cause omits to register, he is liable to a penalty of £50.⁶

Registration is not necessary to the validity of a marriage ; and a marriage may be proved *aliunde* than from registers, as by proof of actual ceremony by a person present.⁷

Fees.—If a person wishes to search the parish register for a marriage, the fee payable to the clergyman is 1s. to cover a search over the entries for one year, and 6d. for every subsequent year. For a certified copy of an entry

¹ 6 & 7 Will. IV, c. 86, s. 30.

² As to stating the age, see *post*, p. 81.

³ S. 31 ; yet, if only signed by one witness, it is admissible as evidence ; *Doe on the demise of Blayney v. Savage* (1844), 1 C. & K., 487.

⁴ S. 40 ; as to stating the age, see *post*, p. 81.

⁵ S. 41 ; and see *R. v. Brown* (1848), 2 C. & K., 504. The prosecution is to be commenced within three years after the offence ; *R. v. Lord Dunboyne* (1850), 3 C. & K., 1.

⁶ S. 42.

⁷ *R. v. Allison* (1806), R. & R., 109 ; and see *post*, Chap. III, s. 3 (a) (c).

in the register, a fee of 2s. 6d. is payable.¹ For searching the duplicate register (which is legal evidence) at Somerset House, the fee is 1s. for a five years', and £1 for a general search, 2s. 6d. for a certified copy.²

(h) *Fees*

As to fees payable to a clergyman for publishing banns and solemnising marriage, "Of common right no fee is due to the minister for performing such branches of his duty, and it can only be supported by a special custom."³ Still, in nearly every parish, in case of banns, "fees of inconsiderable amount (as compared with the payments required for licences), though varying in different places, and often of doubtful legality, are by custom payable."⁴ But such fee must be of a reasonable amount; and it has been decided by the Exchequer Chamber that a fee of 13s., 10s. to the minister and 3s. to the clerk, for banns and marriage was unreasonably high and "rank," and therefore illegal.⁵ It should be understood, however, that this decision as to the legal fee only applies to the bare performance of the ceremony; and if the parties wish to be married with a full choral service and in a church decorated with flowers and red baize, etc., they must pay accordingly.

In case of a marriage licence, fees of varying amount in different diocese are payable to the bishop or his surrogates.⁶ In the province of Canterbury, the fee for the Archbishop's common licence is £2, 2s. 6d. (see *ante*, p. 46 and seq.), inclusive of a 10s. duty under the Stamp Act, 1891. For a special licence (see *ante*, p. 56), a £5 duty is payable thereunder.

¹ 6 & 7 Will. IV, c. 86, s. 35.

² *Ib.*, s. 31-34, 36-38.

³ 3 Bl. Com., 90; and see the Provincial Constitution, Lyndwood, 278, and Phillimore's Ecclesiastical Law, p. 814.

⁴ Marriage Laws Commission, 1868 [4059], p. vi.

⁵ *Bryant v. Foot* (1868), L. R., 3 Q. B., 497; and see *ante*, p. 71, n. 2.

⁶ Marriage Laws Commission, 1868 [4059], p. vii.

SEC. 4.—REQUIREMENTS FOR NONCONFORMISTS' MARRIAGES

(a) *Generally*

Prior to 1836, Nonconformists, in order to be validly married, had to fulfil the rites of the Church of England; and if after marriage in a conventicle the parties assumed to cohabit, their marriage was at Common Law invalid;¹ and after 1753, by Lord Hardwicke's Act, 26 Geo. II, c. 33, s. 8, such marriages were expressly declared null and void. But there are three exceptions to the Common Law and Statutory rule which each stand on different grounds, — marriages by Roman Catholic priests, and Jewish and Quaker marriages,—and must be separately considered.

It appears that at Common Law a marriage by a Roman Catholic priest was valid,² but not after Lord Hardwicke's Act, 26 Geo. II, c. 33; at the present day they are treated like other Nonconformists, with a small exception stated *post*, p. 89, n. 1.

As to marriages according to the Greek Church, it appears from 1836 to 1857 there was a belief that marriages according to the rites and ceremonies of the Greek Church constituted a compliance with the laws of England; and under this belief many marriages within such period were solemnised in the church, or in private houses of members of the Church, in accordance

¹ *R. v. Millis* (1844), 10 Cl. & F., 534. There are very few records of Nonconformist marriages previous to 1753. See Report of Commission, in New Parochial Registers in 1838, pp. 10, 11.

² *R. v. Millis* (1844), *ubi sup.*, per Lord Lyndhurst, L. C., pp. 861, 867; *R. v. Brompton* (1808), 10 East, 282, p. 289; *R. v. Feilding* (1705), 14 State Trials, 1327; but see *Alison's Trusts* (1874), 31 L. T., 638. The Roman Catholics decline to deposit their registers, see Commission of 1837-1857.

with the rites and ceremonies of that Church ; but a special Act (the Greek Marriage Act, 1884) was passed to enable the parties or their issue to apply to the Court, which was hereby empowered under certain circumstances and conditions to declare the marriage valid.¹ As to Quakers and Jews, see *post*, p. 97. But apart from these exceptions of Papists, Jews, and Quakers, the marriages of Nonconformists in general, according to their own rites, was first provided for by the Marriage Act, 1836,² and marriage under this Act and the amending Acts is as good and cognisable in like manner as previous marriages according to the rites of the Church of England.³

The general scheme of the Legislation is to require a notice to the registrar, after which either a certificate or a licence is given to the parties ; and then the marriages can take place according to their own rites in a registered place of worship in the presence of the registrar, or at the registry office, without any religious service, in the presence of the superintendent-registrar, using a certain form of words.

A statutory nullity is created by enacting—

“That if any persons shall knowingly and wilfully intermarry, . . . under the provisions of this Act, in any other place than the church,

¹ 47 & 48 Vict., c. 20 ; and see *Scaramanga v. The Attorney-General* (1889), 14 P. D., 83, rule 213 ; and see Dixon on Divorce, 1st ed., pp. 199-201.

² 6 & 7 Will. IV, c. 85, the short title was given by 55 Vict., c. 10. The Marriage Act, 1836, was subsequently amended by the Births and Deaths Registration Act, 1837, 7 Will. IV, and 1 Vict., c. 22 ; the Marriage Act, 1840, 3 & 4 Vict., c. 72 ; the Marriage and Registration Act, 1856, 19 & 20 Vict., c. 119 ; the Marriage Society of Friends Acts, 1860 and 1862, 23 Vict., c. 18, 35 Vict., c. 10 ; the Marriage Act, 1886, 49 Vict., c. 14. Under these Acts in 1889, 64,509 Nonconformist, out of a total number of 213,865, marriages were solemnised, *i.e.* at the rate of 302 per 1000 ; see the Registrar-General's Report for 1889, pp. vi., xxx., xxxi., table 6.

³ 19 & 20 Vict., c. 119, s. 23.

chapel, or registered building, or office, or other place specified in the notice or certificate as aforesaid, or without due notice to the superintendent-registrar, or without certificate of notice duly issued, or without licence in case a licence is necessary under this Act, or in absence of a registrar or superintendent-registrar where the presence of a registrar shall be necessary under this Act, the marriage of such persons, except in any case hereinafter excepted, shall be null and void."¹

As to the canon of the interpretation of Marriage Acts, and the distinction between statutable nullities and provisions merely prohibitory and directory, and as to the presumption of *omnia rite esse acta*, see *ante*, p. 35, and *post*, Chap. III, s. 4 (a) (c).

All prosecutions under the Act are to be commenced within three years after the offence.²

This legislation only applies to England, and not to the marriage of any of the Royal Family.³

(b) *Notice of Marriage to the Registrar*

The notice of marriage must be given⁴ by one of the parties, under his or her hand, in a certain form.⁵ This form must contain the full Christian names and surnames, their condition, as bachelor, widower, spinster, widow, or unmarried (which is the proper description of a divorced woman, see Chap. XIII), rank, age last birthday, dwelling place; time of residence being not less than seven days, or if more than a month it may be so stated; name of church or building in which the marriage is to be solemnised.⁶

¹ 6 & 7 Will. IV, c. 85, s. 42.

² *Ib.*, s. 41.

³ *Ib.*, s. 45; as to the Royal Family, see *post*, s. 6; and see 19 & 20 Vict., c. 119, s. 25.

⁴ Either personally or by post; see Hammick on Marriage.

⁵ 19 & 20 Vict., c. 119, s. 3, and Schedule A, where the form is given.

⁶ 6 & 7 Will. IV, c. 85, s. 4; as to age, none of the sections of 6 & 7 Will. IV, c. 85, 6 & 7 Will. IV, c. 86, or 19 & 20 Vict., c. 119, expressly require the exact ages of the parties to be stated; although it must be

As to marriage of minors, the like consent is required to a marriage by registrar's licence or certificate as was previously required for a church marriage;¹ as to forbidding a marriage, see *post*, p. 84; and as to false declaration and notice, see *infra*, and pp. 82, 83; and as to forfeiture thereby incurred, see *post*, p. 83. After the marriage it is expressly enacted that it shall not be necessary to give evidence of consent of parent or guardian, nor shall such evidence be received in any suit touching the validity.² As to proportionate number of marriages by minors, see *ante*, p. 29.

The knowingly and wilfully signing a false notice for the purpose of procuring a marriage is perjury.³

Further, at the time of giving notice, the party giving

stated whether or not the parties are adults or minors. In the form of the notice of marriage to and the certificate for marriage by a superintendent-registrar, given in Schedule A and B to 19 & 20 Vict., c. 119, under the age column, the exact age of the parties, as, *e.g.*, 25 and 19 is given. In the form for registration of a marriage in church, given in Schedule C to 6 & 7 Will. IV, c. 86, under the column for age, the exact age is not given, but it is filled up, "of full age" and "minor." On this point, therefore, it is doubtful whether persons marrying can be compelled to give their exact ages for insertion in the notice on the register book; but the matter is of so much importance for statistical purposes that every effort is made both by the clergy and registrars to learn and record exact ages, and only in a very small percentage of cases is the attempt to secure them unsuccessful. As to statistics of age, see *ante*, p. 29. The residence required is previous to giving notice, not subsequent, during the period of publication, see p. 86, n. 1.

¹ 6 & 7 Will. IV, c. 85, s. 10; and see *ante*, p. 51, as to whose consent was necessary. It is believed that in case of minor's marriages it is the practice of the superintendent-registrars to require some further evidence of the parents' consent than the oath of the party.

² 19 & 20 Vict., c. 119, s. 17.

³ 19 & 20 Vict., c. 119, ss. 2, 18. By 6 & 7 Will. IV, c. 85, s. 41, the prosecution must be commenced within three years. But as a man may change his surname and adopt a new one by use and reputation, the giving such new name is not an offence if the new name have been so acquired. *R. v. Smith* (1865), 4 Foster & Finlason, 1099.

the notice shall sign a solemn declaration in writing that there is no impediment of kindred; that they have resided for seven days, or if the marriage is to be by licence, for fifteen days, within the superintendent-registrar's district; and when either of the parties, not being a widow or widower, is under twenty-one, that the consent required by law for such marriage has been given. And every such declaration is to be signed by the party making it, and attested by the registrar; and the knowingly making a false declaration is perjury.¹

A statutable nullity declared by its being enacted "that if any person shall knowingly and wilfully intermarry without due notice to the superintendent-registrar, the marriage shall be null and void."² But a notice to a registrar is not analogous to a marriage by banns, therefore a marriage solemnised after a notice to a registrar in which the particulars were wilfully misstated will not be declared void on the ground that the parties "knowingly and wilfully intermarried without due notice."³ So where a minor, aged fifteen, residing, as well as the other party, at Kidlington, gave notice to the Oxford superintendent-registrar, who was not the registrar of the district, stating his age as fifteen, his residence as Oxford, and misstating the Christian names, marriage was declared good.³ But after marriage it is not necessary to give proof of residence within the district, or of consent of persons whose consent was necessary; nor shall such evidence be received in a suit touching the validity of

¹ 19 & 20 Vict., c. 119, ss. 2, 18, and Schedule A, re-enacting s. 38 of 6 & 7 Will. IV, c. 85.

² 6 & 7 Will. IV, c. 85, s. 42.

³ *Holmes v. Simmons* (1868), L. R. 1, P. & M. 523; *Prowse v. Spurway* (1877), 46 L. J., P. & M. 49; and see *R. v. Rea* (1872), L. R. 1, C. C. R., 365.

such marriage.¹ Further, on proof of actual marriage it will be presumed that due notice was given.²

But if a marriage is had by a false declaration, the party so offending forfeits all interest in property accruing to him under the marriage on suit by the Attorney-General, as under Geo. IV, c. 76.³ The notice must be given by one of the parties to the superintendent-registrar of the district in which they dwell, or if they dwell in different districts (unless the marriage is to be by licence, as to which see *post*, p. 87) to the superintendent-registrars of each's respective district;⁴ and if one of the parties lives in Ireland, he can, if intending to be married in England without a licence, give notice to the registrar of his district in Ireland; if resident in Scotland, and intending to be married in England without a licence, he may obtain a certificate of proclamation of banns from the session-clerk; and such production of Irish registrar's certificate or Scotch certificate of proclamation of banns is equal to the production of the certificate of a superintendent-registrar in England.⁵ But if such Scotch or

¹ 19 & 20 Vict., c. 119, s. 17.

² *R. v. Hawes* (1847), 1 Den., 270.

³ 19 & 20 Vict., c. 119, s. 19, re-enacting 6 & 7 Will. IV, c. 85, s. 43; and see 7 Will. IV, and 1 Vict., c. 22, s. 1; and see *ante*, p. 54.

⁴ 6 & 7 Will. IV, c. 85, s. 4; the district of the superintendent-registrar is usually coextensive with the Union, and such district is usually divided into registrar's sub-districts; but the Registrar-General has power to alter the districts and sub-districts; for the provisions of the law in this respect, and on appointment of registrars and superintendent-registers, see 6 & 7 Will. IV, cc. 85, 86, 7 Will. IV, and 1 Vict., c. 22, 19 & 20 Vict., c. 119, all well detailed in Hammick on Marriage; for actual districts and sub-districts, and the orders thereon, consult Index to London Gazette, 1830-1883, tit. Registrar-General; and the Registrar-General's Annual Report, which is published as a Parliamentary paper, where particulars are given by a list of districts, and of the annual changes, see p. 91, n. 4.

⁵ 19 & 20 Vict., c. 119, ss. 7 and 8. As to notices in Ireland and Scotland to the registrar or session-clerk, see *post*, Chaps. XVIII and XIX. If the marriage is by licence, residence by one party is sufficient; see *post*, p. 87.

Irish resident wishes to be married by licence in England, he must be described as of an English dwelling-place, see p. 87. This notice of particulars is to be entered by the superintendent-registrar in a marriage notice book, and for such entry he is entitled to a fee of one shilling; and such marriage notice book is open at all reasonable times, without fee, to persons desirous of inspecting the same.¹

The notice of marriage, besides being inserted in the marriage notice book, must, unless the marriage be by licence (as to which, see *post*, p. 87), also be suspended or affixed in some conspicuous place in the office of the superintendent-registrar for twenty-one days after the entry of the notice, before any marriage shall be solemnised in pursuance thereof.²

The marriage may be stopped in two ways, either by a person authorised³ in that behalf writing "forbidden" opposite the entry of notice in the marriage notice book, signing his name, address, and authority to forbid, whereon the issue of the certificate is forbidden, and all proceedings thereon utterly void;⁴ or any person on paying five shillings may enter a caveat signed by or on behalf of the opposer, with the opposer's residence and his grounds of his objection, and on such caveat being entered no certificate shall issue until the caveat is withdrawn, or the superintendent-registrar has inquired into the matter of the caveat, and is satisfied that it ought not to obstruct the

¹ 6 & 7 Will. IV, c. 85, s. 5; 19 & 20 Vict., c. 119, s. 3.

² 19 & 20 Vict., c. 119, ss. 1, 4, and 5; once it had to be read at the meeting of the Guardians, 6 & 7 Will. IV, c. 85, s. 6; but this was repealed by 7 Will. IV, and 1 Vict., c. 22, s. 24.

³ Person authorised to forbid marriage by licence, under 4 Geo. IV, c. 76 (see *ante*, pp. 50, 52), can forbid the issue of the certificate, 6 & 7 Will. IV, c. 85, s. 10; but probably other persons than the parents or guardian, *e.g.*, a deserted wife, would be entitled to forbid the issue of the certificate, but an illegitimate parent cannot; see *ante*, p. 50, n. 4.

⁴ 6 & 7 Will. IV, c. 85, s. 9.

issue of the certificate; and in case of doubt the superintendent-registrar may refer the matter to the Registrar-General; or if the superintendent-registrar refuses the certificate, the person who applies for the certificate can appeal to the Registrar-General.¹

But a vexatious and frivolous attempt to prevent a marriage is guarded against, firstly, as to writing "forbidden" by a provision that

"Any person who shall forbid the granting by any superintendent-registrar of a certificate for marriage, by falsely representing himself or herself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury."²

And, secondly, as to the caveat, when entered on a ground that the Registrar-General declares to be frivolous, the objector shall be liable for costs and damages in action by the party against whose marriage a caveat was entered.³

If a superintendent-registrar knowingly and wilfully issues a certificate, the issue of which has been forbidden as above, he is guilty of felony.⁴

On proof of actual marriage it will be presumed that due notice has been given.⁵

(c) *Licence and Certificate for Marriage*

After the entry of the notice, the next step is to obtain the licence or certificate.

And it is expressly provided that where the marriage is not by licence, twenty-one days from the entry of the notice must elapse before the issue of the certificate for marriage;⁶ and if any one solemnises marriage before the

¹ 6 & 7 Will. IV, c. 85, s. 13.

² 19 & 20 Vict., c. 119, s. 18.

³ 6 & 7 Will. IV, c. 85, s. 37; 7 Will. IV, and 1 Vict., c. 22, s. 5.

⁴ 6 & 7 Will. IV, c. 85, s. 40.

⁵ *R. v. Harves* (1847), 1 Den., 270.

⁶ 6 & 7 Will. IV, c. 85, s. 14; and see 7 Will. IV, and 1 Vict., c. 22, s. 1.

expiration of twenty-one days,¹ or the superintendent-registrar knowingly and wilfully issues the certificate before twenty-one days, he is guilty of felony.² This brings us to the consideration of the licence and the certificate, and the difference between them; of which it may be said generally, that the licence, in consideration of larger payment, enables the parties to more speedily and easily marry.

Certificate.—After the expiration of twenty-one days next after the day of the entry of the notice in the marriage notice book, the superintendent shall issue under his hand, upon request of the party giving notice, a certificate in the form in Schedule B, provided that no lawful impediment to the issue of the certificate has been shown, or the issue of the certificate forbidden; and for such certificate the superintendent-registrar is entitled to a fee of one shilling.³

If the parties live in different districts, certificates must be obtained from the superintendent-registrar of each, and the one shilling fee paid for each; *aliter* for licences, see *post*, p. 87.

If the parties knowingly and wilfully intermarry without certificate of notice duly issued, marriage is void,⁴ but on proof of actual marriage it will be presumed that the testamentary certificate was duly issued.⁵

Licence.—It should be noted that with and previous to the issue of the licence, they must also issue the certificate.⁶

¹ 6 & 7 Will. IV, c. 85, s. 39. Residence is not required during the period of publication. Kindly communicated to the author by the General Registry Office, Somerset House, July 13, 1892.

² *Ib.*, s. 40.

³ 19 & 20 Vict., c. 119, s. 4.

⁴ 6 & 7 Will. IV, c. 85, s. 42.

⁵ *R. v. Hawes* (1847), 1 Den., 270.

⁶ But such certificate for marriage by licence is different from the other certificate, being, *e.g.*, printed in red ink, besides other differences; see 6 & 7 Will. IV, c. 85, s. 8.

The same notice must be given, and declaration sworn for a marriage by licence as for a marriage without licence (see *ante*, p. 80), and the same particulars stated and entered in the same way in the marriage notice book ; but instead of a residence of seven days, as in the case of marriage without licence, see *ante*, p. 80. One of the parties must have

“For the space of fifteen days immediately preceding the giving of notice, had his or her usual place of abode or residence within the district of the superintendent-registrar to where such notice shall be so given.”¹

Residence by the other party is unnecessary, but at time of the notice he should be described as of some dwelling-place in England.

Further, if the parties live in different districts, notice need not be given to more than one superintendent-registrar ; but notice must be given to the superintendent-registrar of the district within which one of the parties has resided for the fifteen days ;² *aliter* as to marriages without licence, see *ante*, p. 86.

Also if the marriage is to be by licence, and the party giving notice states this, notice of the marriage need not be suspended in the office of the superintendent-registrar ;³ if without licence, see *ante*, p. 84.

On such notice being duly given, it is provided that

“Every superintendent-registrar receiving notice of an intended marriage to be solemnised by licence as aforesaid, shall, after the expiration of one whole day⁴ next after the day of the entry of such notice in his marriage notice book, issue under his hand, from the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in the said Schedule B to this Act annexed, and also a licence to marry, provided no lawful impediment is shown, or the issue of the certificate forbidden. The fee for such certificate is one shilling.”⁵

¹ 19 & 20 Vict., c. 119, s. 2. Subsequent residence during the period of publication is not required, see p. 86, n. 1.

² *Ib.*, s. 6.

³ *Ib.*, s. 5.

⁴ Under 6 & 7 Will. IV, c. 85, ss. 7 and 40, seven days had to elapse.

⁵ 19 & 20 Vict., c. 119, s. 9 ; and see 6 & 7 Will. IV, c. 85, s. 11.

The form of the licence is to be in the form or to the effect of the said Schedule C; to and for every such licence the registrar is entitled to a fee of thirty shillings over and above the amount paid for stamps necessary on the granting of such licence.¹ If any person shall knowingly and wilfully marry without licence, in case a licence is necessary under the Act, the marriage of such person is void.²

(d) *Place of Marriage*

As to the building in which the marriage must take place, whether it be with or without a licence.

In Church.—Firstly, the marriage may be solemnised after certificate (which takes the place of proclamation of banns) in any church or chapel of the Church of England within the district of the superintendent-registrar who has issued the certificate;³ but it is optional for the clergyman to marry on the registrar's certificate, for it is provided that such marriage must be by consent of the minister of the church, and further, it must be solemnised by an ordained clergyman of the Church of England, and according to the rites and ceremonies of the Church of England.⁴ But a marriage after the superintendent-registrar's licence cannot be solemnised according to the Church of England.⁵

Registered Building.—Secondly, marriage may be

¹ 19 & 20 Vict., c. 119, s. 10; the stamp duty on a licence to marry is ten shillings; see the Stamp Act, 1891, schedule, tit. Licence; and see *post* (g), p. 102.

² 6 & 7 Will. IV, c. 85, s. 42.

³ 6 & 7 Will. IV, c. 85, s. 1; 7 Will. IV, and 1 Vict., c. 22, s. 36.

⁴ 19 & 20 Vict., c. 119, s. 11; and see *R. v. James* (1851), 3 C. & K., 167, where a clergyman was indicted for refusing to marry on a registrar's certificate; but the prisoner had judgment in his favour, and pp. 58, 97.

⁵ 6 & 7 Will. IV, c. 85, s. 11.

solemnised in any building that is a place of worship registered for solemnising marriages.

“For any proprietor or trustee of a separate¹ building certified according to law² as a place of religious worship, may apply to the superintendent-registrar of the district in order that such building may be registered for solemnising marriages therein, and in such case shall deliver to the superintendent-registrar a certificate signed in duplicate by twenty householders at least, that such building has been used by them during one year at least as their usual place of religious worship, and that they are desirous that such place should be registered as aforesaid. Each certificate shall be countersigned by the proprietor or trustee by whom the same shall be delivered.”³

Whereon the superintendent-registrar receiving with the certificate a fee of three pounds, transmits the certificates to the Registrar-General, who must register such building in a book kept for the purpose, endorse the date of registry on the back of both certificates, keep one certificate and return the other to the superintendent-registrar, who thereon enters the date of registry in a book, gives a certificate of registry to the proprietor or trustee, and advertises the registration in a local paper and the London Gazette.³

If the building is disused, the registration is to be cancelled; but if the congregation have removed to some other building for religious worship, such new and

¹ However, a Roman Catholic Chapel used during one year previously for public religious worship may be registered although under the same roof with another building, or part only of a building, 7 Will. IV, and 1 Vict., c. 22, s. 35.

² Such certification was required under the Toleration Acts, and without it the assembling is unlawful. The certifying authority is now the Registrar-General; but certifying is now optional, 18 & 19 Vict., c. 81; further, the absence of certificate is immaterial to the validity of the marriage, 18 & 19 Vict., c. 81, s. 13; 19 & 20 Vict., c. 119, s. 17. It seems that only a Christian or Unitarian place of worship could be certified and therefore registered. So a Mussulman mosque or a pagan temple could not be registered for marriages. The mosque at Liverpool—as is kindly communicated (April 26, 1892) to the author by the General Register Office, through E. Whitaker, chief clerk—is not registered for marriages.

³ 6 & 7 Will. IV, c. 85, s. 18.

substituted building may, on payment of three pounds, be registered, although not used for a year, and on such cancellation or substitution it becomes unlawful to solemnise marriages in the disused building;¹ but as regards the validity of the marriage so long as it takes place in a registered building, it is immaterial that such registered building has not been certified according to law as a place of worship, or is not the usual place of worship of either of the parties.² But a statutable nullity as to the necessity of marriage in a registered building is created by it being enacted³

“That if any persons should knowingly and wilfully intermarry . . . under the provisions of this Act, in any other place than the church, chapel, registered building, or office specified in the notice and certificate as aforesaid, the marriage of such persons shall be null and void.”

But in favour of marriage there is a presumption that a building is registered if a marriage in all other respects valid has been there solemnised, for otherwise the minister would be guilty of felony.⁴ But as to the minister, by way of penalty it is enacted that any person knowingly and wilfully solemnising marriage in any other place than a church or chapel, registered building or office specified in the notice and certificate, shall be guilty of felony, except in the case of Quakers and Jews.⁵ Under these provisions there were 10,335 buildings registered for solemnisation of marriage by other rites than those of the Established Church standing on the register at the end of 1889.⁶

¹ 6 & 7 Will. IV, c. 85, s. 19.

² 19 & 20 Vict., c. 119, s. 17.

³ 6 & 7 Will. IV, c. 85, s. 42.

⁴ *Sichel v. Lambert* (1864), 15 C. B. N. S., 781; *R. v. Cradock* (1863), 3 F. & F., 837.

⁵ 6 & 7 Will. IV, c. 85, s. 39; as to Quakers and Jews, see *post* (f), p. 97.

⁶ The Registrar-General's Annual Report, 1889, pp. vii. and xxxiv., table 9. A list of buildings so registered for marriage may be found in

It will be also presumed on proof of actual marriage that the marriage took place in the registered building specified in the certificate and notice.¹

But no marriage can be solemnised in any such registered building without the consent of the minister, of one of the trustees, owners, deacons, or managers thereof; nor in any registered building of the Church of Rome without the consent of the officiating minister thereof.²

But Jews' and Quakers' marriages, so long as they are solemnised according to their own usages, and after notice and certificate, do not require to be in a registered building.³

Registrar's Office.—Lastly, persons can be married after due notice and certificate at the office and in the presence of the superintendent-registrar and some registrar of the district.⁴

In District of Registrar.—Next, the building in which the persons are to be married must, with some exceptions, be in the *district* of the residence of one of the parties. For in 1840 it was decided that a superintendent-registrar had no jurisdiction to grant a certificate for marriage where it is proposed that the marriage shall take place outside his district;⁵ and it is expressly

the Index to the London Gazette, 1830–83, under the name of each town or place; or if in the Metropolitan area, under the title, London Metropolis Marriage, p. 1079.

¹ *R. v. Hawes* (1847), 1 Den., 270; and see *post*, p. 93.

² 19 & 20 Vict., c. 119, s. 11.

³ See *post* (f), p. 96.

⁴ 6 & 7 Will. IV, c. 85, s. 21; such office is to be taken as within the district, although not locally situate therein, 7 Will. IV, and 1 Vict., c. 22, s. 12; the office is often at the workhouse. For offices in the metropolis, see London Directory, "Official" section; and see *ante*, p. 83, n. 4.

⁵ *Ex parte Brady* (1840), 8 Dowl., 332; and see 3 & 4 Vict., c. 72, s. 1; this restriction was previously specially enacted as to Church of England marriages after a registrar's certificate out of his district. See 7 Will. IV, and 1 Vict., c. 22, s. 36.

provided that no superintendent-registrar shall give a licence for marriage in a church or building outside his district.¹

Exceptions.—This often caused inconvenience, as in the case cited (p. 81, n. 5), where both parties were Roman Catholics, and there being no Roman Catholic chapel in the district (Salford Union) of the superintendent-registrar in which they resided, they wished to be married at Manchester. So the same year an Act was passed enabling parties at the time of giving notice of marriage (see *ante*, p. 80) to further give notice of declarant's own religion, and of the religion according to whose rites the parties propose to be married, and that there be not, to the best of the deponent's knowledge, any registered building of the religion by which they wish to be married within the district, and what is the nearest district in which there is a building, and what is the registered building in that district in which the parties wish to be married; and the superintendent-registrar shall issue his certificate, or certificate and licence, and the same shall be as valid as if issued by the superintendent-registrar of the district within which such registered building is situate.²

Such notice is to be given according to the form in the schedule;³ and if the party knowingly and wilfully makes

¹ 6 & 7 Will. IV, c. 85, s. 11; there is an exception to this, as by s. 6 of 19 & 20 Vict., c. 119, that where the parties intending to be married by licence live in different districts, notice to one superintendent-registrar is sufficient. On this the General Registry Office observes, "In cases where parties to a marriage reside in two districts, the notice being given and the licence issued in the district in which the preliminary residence has been fulfilled, the place of marriage may be in either district of residence, as well as out of both, under 3 & 4 Vict., c. 72, or 19 & 20 Vict., c. 119, s. 14." Kindly communicated to the author by the Department on July 13, 1892, through E. Whitaker, chief clerk.

² 3 & 4 Vict., c. 72, s. 2; 19 & 20 Vict., c. 119, ss. 3 and 13.

³ 3 & 4 Vict., c. 72, s. 3.

a false declaration, he is guilty of perjury ; but the prosecution must be commenced within eighteen months after the marriage.¹ However, the marriage is in any case valid.²

Further, if the marriage is intended to be solemnised in the usual place of worship of one or both of the parties, but such place of worship is not of the district of residence, the superintendent-registrar on receiving notice and declaration stating these facts, can give a certificate or licence for such marriage in a registered place of worship out of his district, provided it is not more than two miles out of his district ;³ but if such marriage has been solemnised, it shall not be necessary to prove in support of the marriage that such registered building was "the usual place of worship of either of the parties, nor shall such evidence be received in any suit touching the validity."⁴ But such limitation as to marriage within the district of the superintendent-registrar who has given the licence or certificate does not apply to Jews or Quakers, who may be married in a place or building outside the district.⁵

Further, in every case the marriage must take place in the church, registered building, or office specified in the notice and certificate ; and if they knowingly and wilfully intermarry in any other place, the marriage is void.⁶

(e) Solemnisation of the Marriage, and Registration

In all cases such marriage must take place at some time within three calendar months next after the day of the entry of the notice, whether such marriage is by

¹ 3 & 4 Vict., c. 72, s. 4, and schedule.

² *Ib.*, s. 2.

³ 19 & 20 Vict., c. 119, s. 14.

⁴ *Ib.*, s. 17.

⁵ 3 & 4 Vict., c. 72, s. 5 ; and see *ante*, p. 90, and *post* (f).

⁶ 6 & 7 Will. IV, c. 85, s. 42. But it will be presumed that the solemnisation was in the place specified, see *ante*, p. 91.

licence and certificate¹ or by certificate without licence.² If a marriage is not had within three months, the notice, certificate, and licence is void, and a new notice must be given;³ and any one solemnising marriage after such three months is guilty of felony;⁴ and any registrar or superintendent-registrar who shall knowingly and wilfully issue certificates or licence for marrying three months after entry of notice, is guilty of felony.⁵

In Church.—*Firstly*, according to the Established Church, such marriage can only take place by consent of the minister of the church.⁶ This consent obtained, the superintendent's certificate, or in case the parties live in different districts, the certificate of each superintendent-registrar, is to be delivered to the officiating minister.⁷ The marriage can then be solemnised by a duly ordained clergyman of the Church of England, and according to its forms and ceremonies.⁸

In registered Building.—*Secondly*, by Nonconformist rites in a registered building. As to registration, see *ante*, p. 88. As to marriage at a foreign embassy, see *ante*, p. 63. Such marriage can only take place in such registered building by consent of the minister, or one of the trustees, owners, or managers thereof; or if in a registered building of the Church of Rome, by the consent of the officiating minister thereof.⁹ This consent obtained, the superintendent-registrar's licence or certificate, or the certificate of each superintendent-registrar, is to be delivered to the registrar present at the marriage.¹⁰

¹ 19 & 20 Vict., c. 119, s. 9.

² *Ib.*, s. 4.

³ 6 & 7 Will. IV, c. 85, s. 15.

⁴ *Ib.*, s. 39.

⁵ *Ib.*, s. 40; 7 Will. IV, and 1 Vict., c. 22, s. 3.

⁶ 19 & 20 Vict., c. 119, s. 11; and see p. 88.

⁷ 6 & 7 Will. IV, c. 85, s. 16.

⁸ 19 & 20 Vict., c. 119, s. 11; and see 6 & 7 Will. IV, c. 85, s. 1. As to what are these forms, see *ante*, p. 64 and seq.

⁹ 19 & 20 Vict., c. 119, s. 11.

¹⁰ 6 & 7 Will. IV, c. 85, s. 16.

Then "the marriage may be solemnised in the registered building stated as aforesaid in the notice of such marriage between and by the parties described in the notice and certificate according to such form of matrimony as they may see fit to adopt. Provided, nevertheless, that every such marriage shall be solemnised, with open doors between eight in the forenoon and three in the afternoon, in the presence of some registrar of the district in which such registered building is situate, and of two or more credible witnesses: provided also that in some part of the ceremony, and in the presence of such registrar and witnesses, each of the parties shall declare, 'I do solemnly declare, that I know not of any lawful impediment why I, *A. B.*, should not be joined in matrimony to *C. D.*'

"And each of the parties shall say to the other, 'I call upon these persons here present to witness that I, *A. B.*, do take thee, *C. D.*, to be my lawful wife (or husband).'

"Provided also there is no lawful impediment to the marriage of such parties."¹

The registrar is entitled for every marriage they solemnise in his presence to a fee of ten shillings if the marriage is by licence, or five shillings if without licence.²

The presence of the registrar is important, as it is expressly enacted that if any person shall knowingly and wilfully intermarry in the absence of a registrar or superintendent-registrar, where the presence of a registrar or superintendent-registrar is necessary under the Act, the marriage of such persons should be null and void;³ and further, that every person who in any such registered building shall knowingly and wilfully solemnise any marriage in the absence of a registrar of the district in which such registered building is situate, should be guilty of felony; but the prosecution must be commenced within three years.⁴ But in favour of marriage, the presence of the registrar at a marriage seemingly otherwise legal is

¹ 6 & 7 Will. IV, c. 85, s. 20; 49 Vict., c. 14. The form of words in the ceremony was directed to be translated into Welsh, and that such translation might be lawfully used by 7 Will. IV, and 1 Vict., c. 22, s. 23.

² 6 & 7 Will. IV, c. 85, s. 22; and see *post* (g), p. 102.

³ *Ib.*, s. 42.

⁴ *Ib.*, ss. 39, 40.

presumed in the absence of evidence to the contrary.¹ The registrar is then to register such marriage in a marriage register book, the entry to be signed by the person solemnising the marriage, by the registrar, by the parties, and by the two witnesses.² The registrar may ask of the parties to be married the particulars required to be registered;³ and for any false statement made or caused to be made for the purpose of being inserted in the register, they are subject to the same pains and penalties as if guilty of perjury.⁴ If the registrar omits to register, he is liable to a penalty of £50;⁵ and if he knowingly and wilfully register a marriage by the Act 6 & 7 Will. IV, c. 85, declared to be void, he is guilty of felony.⁶

In Registrar's Office.—Persons objecting to marry in a registered building can, after due notice and certificate or licence as aforesaid, contract and solemnise marriage at the office, and in the presence of the superintendent-registrar and some registrar of the district, and in the presence of two witnesses, with open doors, and between the hours aforesaid, making the declaration, and using the form of words aforesaid, as in a registered building; see *ante*, p. 95.⁷ As *ante*, p. 95, and *post* (g), p. 102, the registrar is entitled to a fee of ten shillings or five shillings, though the superintendent-registrar receives nothing, and the marriage must be registered. A registrar or superintendent-registrar who shall knowingly and wilfully solemnise in his office any marriage

¹ *Sichel v. Lambert* (1864), 15 C. B., N. S., 781.

² 6 & 7 Will. IV, c. 85, s. 23.

⁴ 6 & 7 Will. IV, c. 86, s. 41.

⁶ 6 & 7 Will. IV, c. 85, s. 40.

³ *Ib.*, s. 36.

⁵ *Ib.*, s. 42.

⁷ *Ib.*, ss. 11 and 21; but even if the marriage took place privately, and with closed doors, the marriage is not therefore void, for provision as to open doors is not included in the clause of the Act, s. 42, relating to nullities, and is therefore merely directory. *Campbell v. Corley* (1856), 4 W. R., 675.

declared by the Act 6 & 7 Will. IV, c. 85, null and void, is guilty of felony.¹

No religious service can be used at the registry office ; but if the parties please they can afterwards superadd a religious service according to the Church of England, or any Nonconformist rite ; and on production to the clergyman or minister of the certificate of marriage before the registrar, such clergyman or minister may remarry them ; but such celebration shall not invalidate the previous marriage, nor is it to be registered in the parish register.²

(f) *Quakers and Jews*

The marriages of Jews and Quakers were specially exempted from Lord Hardwicke's and the subsequent Marriage Acts providing that nothing in the Act shall extend to Jews or Quakers, provided both parties to such marriages shall be Jews or Quakers respectively.³ As to Quakers' marriages, since 1753, Lord Hardwicke's Act, the Legislature thereby acknowledged the validity of their marriages ;⁴ but previous to that Act it seems that, like other marriages *per verba de præsenti*, they were invalid.⁵ But such Quakers' marriages, previous to 1837, are now expressly validated.⁶

As to Jews, that people stood for many centuries in a peculiar and autonomous condition. Ceremonies according to their own peculiar forms were regarded as constituting legal marriage ; and the matrimonial law of England for

¹ 6 & 7 Will. IV, c. 85, s. 40 ; 7 Will. IV, and 1 Vict., c. 22, s. 3.

² 19 & 20 Vict., c. 119, s. 12.

³ 26 Geo. II, c. 33, s. 18, and 4 Geo. IV, c. 76, s. 31.

⁴ *R. v. Millis* (1844), 10 Cl. & F., 534, pp. 671, 745, 791, 866 ; and see *Haughton v. H.* (1824), 1 Moll, 611, decided on the Irish Act, 21 & 22 Geo. III, c. 25.

⁵ *R. v. Millis*, *ubi sup.*, pp. 671, 791, 864, 901.

⁶ 10 & 11 Vict., c. 58.

Jews is their own matrimonial law,¹ and the judges must receive evidence on Jewish law as on a foreign law, and then apply the principles of that law.

As in a curious case where a Jewess had married a Jew by the Kedushim, or giving of the ring in the presence of two witnesses, but without the Hupa, *i.e.*, the formal ceremony and contract signed and registered, the marriage was held invalid;² and again, a Jewish marriage was declared invalid because the celebration was not conformable to the law of the Jews on account of the two necessary witnesses being disqualified, one by reason of nonconformity and the other by relationship.³ Now all Jewish marriages previously to 1837 are by a special Act expressly validated.⁴ At Common Law it anciently appeared that a marriage between a Jew and a Christian was void, see *ante*, p. 23; also by Jewish law, intermarriage between Jews and Christians are forbidden.⁵

And since 1837, Jews and Quakers, both parties being Jews or Quakers, can marry according to their own usages, provided notice to the registrar shall have been given, and the registrar's certificate issued⁶ or licence given;⁷ as to the certificate and the licence, see *ante*, pp. 80, 85.

But both Quakers and Jews still enjoy certain special privileges, such as being enabled to marry out of the district in which they reside, and not in a registered building, and without the registrar's presence, which privileges are best considered in detail separately.

¹ *R. v. Millis*, *ubi sup.*, pp. 672, 864, 900.

² *Lindo v. Belisario* (1796), 1 Hag. Con., 216, and App., p. 7.

³ *Goldsmid v. Bromer* (1798), 1 Hag. Con., 324; and see *Horn v. Noel* (1807), 1 Camp., 61; and *Moss v. Smith* (1840), 1 M. & G., 228.

⁴ 10 & 11 Vict., c. 58.

⁵ See *Goodman v. G.* (1859), 5 Jur., N. S., 902; and see *post*, p. 139, n. 3.

⁶ 6 & 7 Will. IV, c. 85, s. 2.

⁷ 19 & 20 Vict., c. 119, ss. 20-22.

First, *As to Quakers*.—It was originally expressly provided that the parties to a Quaker marriage must be both of the said Society.¹ But now it is provided that in case one or both parties are not members of the Society, they must, on giving notice to a superintendent-registrar, produce a certificate signed by some registering officer of the said Society (as to who is a registering officer, see *infra*) that each party is authorised by the rules of the Society to proceed to a marriage according to the usages of such Society, this certificate to be conclusive evidence that the party or parties are so authorised; and after the marriage the register, or a copy thereof, to be conclusive evidence that the certificate was provided; but no such certificate is to be required if the party giving notice declares that both parties are members of the said Society, or in profession with or members thereof.²

The marriage need not take place in a registered building, or in the district of the superintendent-registrar.³

As to the registration, the Registrar-General is to furnish marriage register books and forms for certified copies thereof to every person whom the recording clerk of the Society of Friends, commonly called Quakers, at their central office in London shall from time to time certify in writing under his hand to the Registrar-General to be a registering officer in England of the said Society.⁴ And every such registering officer of the Quakers, as soon as

¹ 6 & 7 Will. IV, c. 85, s. 2.

² 23 & 24 Vict., c. 18; 35 & 36 Vict., c. 10.

³ 6 & 7 Will. IV, c. 85, s. 39; 3 & 4 Vict., c. 72, s. 5.

⁴ 6 & 7 Will. IV, c. 86, s. 30. In 1853, 124 marriage register books of the Quakers were delivered to the Commission on Non-Parochial Registers, see Report, Parl. Paper, 1857-58 [2331]; a list of registers is also contained in Schedule P to the Commission of 1837 in Non-Parochial Registers' Report, published in 1838, see p. 12 of Report; and see *post*, p. 135, n. 4.

conveniently may be after the solemnisation of any marriage between Quakers in the district for which he is registering officer, shall register the marriage. And every such registering officer, whether he shall or shall not be present at such marriage, shall satisfy himself that the proceedings in relation thereto have been conformable to the usage of the said Society ; and the entry in the register is to be signed by the registering officer, by the parties, and by two witnesses.¹

Such registering officer may ask the parties married the several particulars required to be registered ;² and if he refuses or omits to register, he is liable to a penalty of £50.³

Secondly, *As to Jews*.⁴—Both⁵ parties must be Jews, and must obtain the superintendent-registrar's certificate⁶ or licence.⁷

The marriage need not take place in a registered building, or in the superintendent-registrar's district.⁸ But it must be according to their own rites, as to the observance of which the secretary of the synagogue must satisfy himself, see *post*, p. 101 ; as to what are these rules, see *ante*, pp. 97, 98. As to the registration, it is provided that the Registrar-General shall furnish marriage register books and forms for certified copies thereof to every person whom the president, for the time being, of the London

¹ 6 & 7 Will. IV, c. 86, s. 31.

² *Ib.*, s. 40.

³ *Ib.*, s. 42.

⁴ See Jewish Law of Marriage and Divorce, by Wielziemer. Not only the Act of Parliament, but also the Jewish law forbid a marriage between a Jew and a female of another faith, and also the solemnisation of the same ; *Goodman v. G.* (1889), 5 Jur., N. S., 902, App. But such a marriage may be presumed, see *post*, Chap. III, s. 4, p. 139, n. 3.

⁵ At Common Law, marriage between Jew and Christian was illegal, see *ante*, p. 23 ; but now a Jew and Christian or two Jews can marry according to Christian forms, which, however, they must then observe, see *Jones v. Robinson* (1815), 2 Phillim., 285, but not according to Jewish forms.

⁶ 6 & 7 Will. IV, c. 85, s. 2.

⁷ 19 & 20 Vict., c. 119, s. 21.

⁸ 6 & 7 Will. IV, c. 85, s. 39 ; 3 & 4 Vict., c. 72, s. 5.

Committee of Deputies of the British Jews shall from time to time certify in writing under his hand to the Registrar-General to be the secretary of a synagogue in England of persons professing the Jewish religion,¹ and to the person whom twenty householders professing the Jewish religion, and being members of the West London Synagogue of British Jews, shall certify in writing under their hands to the Registrar-General to be the West London Synagogue of British Jews, and also to every person whom such secretary shall in like manner certify to be the secretary of some other synagogue of not less than twenty householders professing the Jewish religion, and being in connection with the West London Synagogue, and having been established for not less than one year.²

And every secretary of a synagogue, immediately after every marriage solemnised between any two persons professing the Jewish religion, of whom the husband shall belong to the synagogue of which he is member, shall register the same in the marriage register books; and every such secretary, whether he shall or shall not be present at such marriage, shall satisfy himself that the proceedings in relation thereto have been conformable to the usages of the persons professing the Jewish religion; and such entry in register shall be signed by the secretary, by the parties, and by two witnesses.³ Such secretary of a synagogue is to perform similar duties in registering as a registrar.⁴

And it is lawful for every secretary of a synagogue to ask the parties married the several particulars required to

¹ 6 & 7 Will. IV, c. 86, s. 30.

² 19 & 20 Vict., c. 119, s. 22.

³ 6 & 7 Will. IV, c. 86, s. 31. The Jews refused to deliver up their registers; see Commission on Non-Parochial Registers, Parl. Paper, 1837-38 [148], p. 12; and later Commission, Parl. Paper, 1857-58 [2331].

⁴ 19 & 20 Vict., c. 119, s. 22.

be registered ;¹ and if such secretary refuses or omits to register, he incurs a penalty of £50.² Jews standing in the relation of husband and wife have a claim to relief from the Courts on the violation of any matrimonial duty.³

(g) Fees

The fees for the preliminaries to and for the attendance of the registrar at a Nonconformist marriage are altogether fixed by the statute, the Marriage Act, 1836 ; the Marriage and Registration Act, 1856 ; and the Stamp Act, 1891.⁴

For registrar's licence the total fee is £2, 4s. 6d., payable to the superintendent-registrar, of which 1s. is payable for the entry of the notice ; 1s. for the issue of the certificate ; £1, 10s. for the licence ; and 12s. 6d. under the Stamp Act, 1891.⁵

If the marriage is by certificate without licence, there is payable to the superintendent-registrar 2s. ; 1s. for entering the notice, and 1s. for issuing his certificate. If the parties live in different districts, this 2s. must be paid to the superintendent-registrar of each district.⁶

At the marriage, there is payable to the registrar for his presence 10s., if the marriage is by licence ; 5s., if without licence by certificate.⁷ These fees are due whether the marriages take place in the registrar's office or at a registered building. The presence of the registrar is not needed at, and therefore this fee is not payable for, a Quaker or Jewish marriage.

¹ 6 & 7 Will. IV, c. 86, s. 40.

² *Ib.*, s. 41.

³ *D'Aguilar v. D'A.* (1794), 1 Hag. Ec., 773.

⁴ 19 & 20 Vict., c. 119 ; 54 & 55 Vict., c. 39.

⁵ 19 & 20 Vict., c. 119, ss. 3, 9, 10 ; and see schedule to Stamp Act, 1891, tit. Affidavit and Licence.

⁶ 19 & 20 Vict., c. 119, ss. 3 and 4.

⁷ 6 & 7 Will. IV, c. 85, s. 22.

The fee payable to the Nonconformist minister is a matter of private arrangement.

The register may be searched at the local office or at Somerset House, and certified copies obtained.¹

SEC. 5.—MARRIAGES ABROAD

(a) *Generally*

The Marriage Acts, both Lord Hardwicke's, 26 Geo. II, c. 33, s. 18, and the present Acts, 4 Geo. IV, c. 76, by s. 33, and 6 & 7 Will. IV, c. 85, by s. 45, only apply to England and Wales. Outside these limits the old English Common Law applies, except in so far as in the British Dominions it is modified by local law; and in foreign countries, according as the English Courts apply the principles of International Law.

The Common Law requires that the marriage should take place in the presence and with the assent of an ordained clergymen, who must be a third person; but the House of Lords left it an open question whether this applies to the case of marriages of necessity entered into where the presence of a minister in holy orders may be impossible.²

And in two cases in remote districts—up country in India, and in Australia—where there were no chaplains available, marriages *per verba de præsenti* were held good, and these cases were not disapproved by the House of Lords;³ but in two others, a marriage in foreign parts at Smyrna,⁴ and a marriage on board a transport at sea by a

¹ 6 & 7 Will. IV, c. 86, ss. 35, 37; and see 37 & 38 Vict., c. 88.

² *R. v. Millis* (1843), 10 Cl. & F., 534; *Beamish v. B.* (1861), 9 H. L. C., 274; as to marriages by a Roman Catholic priest, see *ante*, p. 78, n. 2.

³ *Catterall v. C.* (1847), 5 N. of C., 466; 1 Rob., 580; *Maclean v. Cristall* (1849), 7 N. of C., Sup. XVII.

⁴ *Catherwood v. Caslon* (1844), 13 Meeson & Welsby, 261.

commanding officer, marriages *per verba de præsenti* were held void.¹

The subject here discussed is a marriage outside England according to English forms; in Chap. XVII is discussed the result of the marriage of English persons in foreign countries, either in accordance with or violating the English or Foreign Law, and what effect that has on the validity of the marriage in England; and see *post*, 112, n. 4.

(b) *In Foreign Countries*²

As a general rule British subjects marrying abroad can marry validly according to the law of the country. Lord Stowell laid down, "That English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else; but they have not *à converso* established that marriages of British subjects not good according to the general law of the place where celebrated, are universally and under all circumstances to be regarded as invalid in England. It is therefore certainly to be advised that the safest course is always to be married according to the law of the country, for then no question can be stirred."³ However, such marriage would not be valid if in contravention of English law, *e.g.* a marriage with deceased wife's sister; see *post*, Chap. XVII, s. 2 (b).

¹ *Du Moulin v Druitt* (1860), 13 Ir. C. L., 212.

² For a synopsis of the law of all countries on marriage and divorce, see Calvo, *Le Droit International*, 4 ed., 1888, bk. x.; *Conflit des Lois Civiles*, vol. ii. pp. 234-289; and see subsequent legislation in the *Periodical Annuaire de Legislation Etrangere*.

³ *Ruding v. Smith* (1821), 2 Hag. Con., 371, pp. 390, 391; and see Hubback on Succession, pt. 2, chap. iv., sec. 3, pp. 329-377; a marriage solemnised in accordance with the local law can be registered by the British consul, 55 & 56 Vict., c. 23, s. 18. This question is further discussed under International Law, Chap. XVII.

If a British subject marries abroad according to the local law, such British subject on paying the proper fee (£1) to the consul can require the personal attendance at the marriage of the British consul. The consul on being satisfied that the marriage is duly solemnised in accordance with the local law, may register it.¹

As to marrying in a foreign country by English forms, certain exceptions, depending on the doctrine of extritoriality, to the necessity of conforming to the *lex loci* have been recognised, whereby such marriage will be recognised as valid in England whether or not it be valid by the *lex loci*.

As to past marriages, the Consular Marriage Act, 1849, expressly validates "all marriages, both or one of the parties being subjects or subject of this realm, which before the passing of this Act have been solemnised in any foreign country or place . . . by a minister in holy orders, according to the rites and ceremonies of the Church of England . . . or by an ordained minister of the Church of Scotland," unless the marriage has been previously declared invalid, or either of the parties have intermarried with any other person.² But this does not touch the question of whether such foreign country would recognise the validity of such marriage not conforming to its own law although it might be valid according to the law of England.³

It is now proposed to discuss these exceptions.

Firstly, *Within the lines of a British Army of Occupation*.—A British force in occupation of a foreign country carries with it the law of England, and marriage can be

¹ Foreign Marriage Act 1892, 55 & 56 Vict., c. 23, s. 18; and see s. 10 of the Order in Council, Nov. 24, 1891, under the Foreign Marriage Acts, 1890, 1891, and s. 26 of the Foreign Marriage Act, 1892; published in the Statutory Rules and Orders, 1891, p. 518; and see The Consular Fees (General) Order in Council, 1892, London Gazette, Aug. 23, 1892, pp. 4802-3.

² 12 & 13 Vict., c. 68, s. 20.

³ See Chap. XVII, s. 6.

celebrated, at all events if one of the parties is a soldier in such British force, either by the chaplain or some person in orders.¹ So when the army under the Duke of Wellington was occupying Paris, and Lord Waldegrave, an officer quartered there, was married by the chaplain, the son of that marriage established his claim to the earldom;² and a marriage was held valid so solemnised during the occupation of the Cape.³ And marriages “solemnised within the *British* lines by any chaplain or officer, or other person officiating under orders of the Commanding Officer of a *British* army serving abroad,” are by the Marriages Validity Act, 1823, and by the Foreign Marriage Act, 1892, declared to be valid.⁴

Secondly, *At Embassies and Consulates*.—By the comity of International Law, embassies are considered extra-territorial of the country in which they are locally situate, and to be a part of the country which the ambassador represents; and applying this principle, a marriage may be celebrated within such ambassador’s house or chapel according to the law of the country which such ambassador represents,—at all events if one or both of the parties married are subjects of such ambassador’s sovereign or State.⁵ So at Common Law it would appear that a British subject might contract a valid marriage abroad in the house or chapel of the British ambassador, and according to the rites of the Church of England.

¹ *Ruding v. Smith* (1821), 2 Hag. Con., 371; and see 4 Geo. IV, c. 91; *R. v. Brampton* (1808), 10 East, 282.

² The *Waldegrave Peerage* (1837), 4 Cl. & F., 649.

³ *Ruding v. Smith*, *ubi sup.*

⁴ 4 Geo. IV, c. 91; 55 & 56 Vict., c. 23, s. 22.

⁵ Per Lord Stowell in *Ruding v. Smith* (1821), 2 Hag. Con., 371, p. 386; and see *Pertreis v. Tondear* (1790), 1 *ib.*, 137; *Earl of Athlone’s case* (1841), 8 Cl. & F., 262. As to the converse case of marriages in England in the chapel of a foreign ambassador or in a foreign consulate, see *ante*, p. 63, and *post*, Chap. XVII, s. 6.

But the validity of a marriage *per verba de præsenti* in the Beyrout consulate, in the presence of the consul, was held not proved in an action for criminal conversation.¹

Validation.—The Marriages Validity Act, 1823, 4 Geo. IV, c. 91, validated all marriages solemnised by a minister of the Church of England in an ambassador's or minister's house or chapel;² and this even though one only of the parties was a British subject.³ But this Act is repealed by the Marriage Acts, 1890 and 1892.⁴ As to past marriages, the Consular Marriage Act, 1849, specially validates all marriages of which one or both the parties are British subjects, solemnised according to any religious ceremonies, or *per verba de præsenti*, either in the presence of the ambassador, consul, etc., exercising his functions, or registered by the consul, unless the marriage has been previously declared invalid by a Court of competent jurisdiction, or either of the parties has subsequently intermarried.⁵

The Consular Marriage Act, 1849,⁶ provides for marriages before a consul after notices, preliminaries, and procedure, *i.e.* in a form somewhat similar to that provided

¹ *Catherwood v. Caslon* (1844), 13 M. & W., 261; this marriage would, however, be validated by 12 & 13 Vict., c. 68, s. 20, quoted *supra*.

² The presence of the consul will not suffice. So a marriage at Antwerp, where there was no consulate or factory, in the presence of the consul, solemnised by a minister of the Church of England, was not validated by 4 Geo. IV, c. 91, and being void by the law *loci*, was held invalid in England; *Kent v. Burgess* (1840), 11 Sim, 361. Such marriage would be validated by 12 & 13 Vict., c. 68, s. 20; see *supra*.

³ *Lloyd v. Petitjean* (1839), 2 Curteis, 251.

⁴ 53 & 54 Vict., c. 47, s. 12; 55 & 56 Vict., c. 23, s. 26.

⁵ 12 & 13 Vict., c. 68, s. 20.

⁶ 12 & 13 Vict., c. 68. By s. 11 a copy of the register was by that Act directed to be sent back to the Registrar-General, and a large number of registers of marriages previous to the Act are now deposited with the Registrar-General; see *post*, Chap. III, s. 3 (a), pp. 135, 137.

by 6 & 7 Will. IV, c. 85, see *ante*, s. 4, pp. 78–97, for marriages before a registrar.

Foreign Marriage Act, 1892.—This Act repeals¹ the Consular Marriage Act, 1849, with its amending Acts, and forms the present code for marriages of British subjects abroad. It does not extend to the marriage of any of the Royal Family.²

The Foreign Marriage Act, 1892, applies to cases where one only of the parties is a British subject.³ But as to mixed marriages between British subjects and aliens, the Order in Council made previously, but confirmed by that Act,⁴ directs that if one of the parties is a subject of the State within whose territories the marriage is to be solemnised, and a marriage according to the local laws of that State would be valid in England, and there exist sufficient facilities for marriage according to the local law, then the marriage officer may refuse to solemnise according to the Foreign Marriage Act. Also, if the woman intending marriage is a British subject, and the man is an alien, and it appears to the marriage officer that the marriage would not be recognised by the law of the alien husband's country, he shall not proceed to solemnise the marriage.

If both the parties are British subjects, or one a British subject and the other an alien, not a subject of the country in whose territory the marriage is solemnised, but subject to the condition of validity according to the law of the alien husband's country, then a marriage can take place under the Foreign Marriage Act, 1892.⁵

The Foreign Marriage Act, 1892, empowers the

¹ 55 & 56 Vict., c. 23, s. 26.

² *Ib.*, s. 23.

³ *Ib.*, s. 1.

⁴ *Ib.*, s. 26, and see s. 21.

⁵ Order in Council of November 24, 1891, ss. 6, 7, published in the Statutory Rules and Orders, 1891, p. 518; and see 55 & 56 Vict., c. 23, s. 19. For the foreign view of consular marriages between British

Secretary of State, by a "marriage warrant," to constitute a British ambassador, consul, governor, etc., a "marriage officer," and assign to him a district.¹

Notice by one of the parties must be given to a marriage officer, stating name, surname, profession, condition, residence of each of the parties, and whether or not they are minors. The notice must be given to the marriage officer within whose district *both*² of the parties have resided seven days previous.³

The notice must be filed and posted up in the office of the marriage officer.⁴ The like persons as in case of a marriage in England (see *ante*, p. 52) have a right to forbid, or consent, or issue a caveat.⁵ After this, *both* the parties must appear before the marriage officer, and subscribe with an oath that there is no impediment, that they are not minors, or that consent has been obtained, and that both for three weeks preceding had their usual residence in the district.⁶ Then, after fourteen days from the ending of the notice, and within three months after, the marriage can take place between 8 A.M. and 3 P.M., at the official house, and in the presence of the marriage officer, and with open doors. Subject to these conditions, the marriage may be solemnised either according to the rites of the Established Church or according to any other rites the parties choose, or by the marriage officer himself. If the marriage is not according to the rites of the Established Church, the prescribed words (see *ante*, p. 95)

subjects and aliens, see *post*, Chap. XVII, s. 6; and for the converse case, see *ante*, p. 63.

¹ 55 & 56 Vict., c. 23, s. 11; and see the Order in Council.

² A modification as to this is contained in s. 8 of the Order in Council of November 24, 1891, published in the Statutory Rules and Orders, 1891, p. 518.

³ 55 & 56 Vict., c. 23, s. 2.

⁴ *Ib.*, s. 3.

⁵ *Ib.*, ss. 3, 4, and 5.

⁶ *Ib.*, s. 7.

must be said.¹ The marriage is then to be registered.² The cost of such marriage is 10s. for the notice and 10s. for the marriage, *i.e.* £1 altogether.³

Lack of formalities is not to annul the marriage,⁴ although the parties may be punished therefor.⁵ A marriage under the Act is to be as valid as if solemnised in England.⁶

Thirdly, *In Factories*. — And this principle of extra-territoriality has been extended beyond embassies and consulate to factories situated in certain foreign countries, which enjoy special privileges by virtue of treaties, conventions, and capitulations, so that British subjects can therein contract valid marriages according to the English Common Law. Such factories formerly existed at Lisbon, Leghorn, Oporto, Cadiz, St. Petersburg, Hamburg, and throughout the East at Smyrna, Aleppo, and elsewhere,⁷ but are now much diminished in number.

The St. Petersburg factory was abolished in 1807 ; but a special Act was passed in 1823, 4 Geo. IV, c. 67, validating marriages where one or both of the parties is a British subject, celebrated since 1807 at St. Petersburg, by the chaplain of the Russia Company, or a minister of the Church of England officiating instead of the chaplain, either in the chapel or in any other place, before witnesses, previous to the Act, and authorising them in the future. But as to marriages after January 1, 1891, this Act is repealed by the Marriage

¹ 55 & 56 Vict., c. 23, ss. 6, 8.

² *Ib.*, ss. 9, 10.

³ *Ib.*, ss. 9, 20 ; and see the Order in Council, 2nd schedule ; and The Consular Fees (General) Order in Council, 1892, London Gazette, Aug. 23, 1892, pp. 4802-3.

⁴ *Ib.*, s. 13.

⁵ *Ib.*, ss. 14-16.

⁶ *Ib.*, s. 1.

⁷ Per Lord Stowell *Ruding v. Smith*, *ubi sup.*, pp. 385, 386 ; and per Sir George Hay in *Harford v. Morris* (1776), 2 Hag. Con., 423, p. 432 ; and see *Maltass v. M.* (1844), 3 N. C., 257. As to the registers, see p. 135, n. 4.

Act, 1890,¹ and future marriages at St. Petersburg must be solemnised according to the Foreign Marriage Act, 1892 (see *ante*, pp. 108–110), but with a certain exemption as to requirements as to notice and residence.²

The Hamburg factory was abolished in 1808; but an Act was passed in 1833³ validating past marriages between parties, one of whom is a British subject, solemnised by the chaplain, or a minister of the Church of England officiating instead of the chaplain, in the Episcopal Chapel of the city of Hamburg, or in any other place, before witnesses, according to the rites of the Church of England.

And marriages at Moscow, in the chapel there belonging to the Russian Company, solemnised by the chaplain or a minister of the Church of England, were validated by an Act passed in 1858.⁴

And a general Act,⁵ passed in 1823, validates marriages solemnised by a minister of the Church of England in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory; but this Act is repealed by the Foreign Marriage Acts, 1890 and 1892.⁶

So, in future, marriage at a British factory abroad, if any such still exist, enjoy no special privileges, and must be governed by the ordinary law applying to marriages abroad; see in Foreign Countries, *ante*, p. 104 and seq.

And there remains on the question as to past marriages previous to the Act above cited, and not coming within the validating clause, and as to such subsequent marriages not conforming to the provisions of the Foreign Marriage

¹ 53 & 54 Vict., c. 47, s. 12.

² See Order in Council of May 9, 1891, published in the Statutory Rules and Orders, 1891, p. 517.

³ 3 & 4 Will. IV, c. 45.

⁴ 21 & 22 Vict., c. 46.

⁵ 4 Geo. IV, c. 91.

⁶ 53 & 54 Vict., c. 47, s. 12; 55 & 56 Vict., c. 23, s. 26.

Acts,—*e.g.*, previous to 1849 a marriage *per verbi de præsenti*, not in the presence of, or registered by, the consul; as to marriages since 1849, either *per verbi de præsenti*, or according to the rites of the Church of England in, say, an hotel chapel,—whether such marriages will be valid if not conforming to the *lex loci*.¹

And as to the effect of the Foreign Marriage Acts, 1849–1891, and the Foreign Marriage Act, 1892, therein it should be noticed, firstly, that they do not contain any statutory nullity as to the effect of this, see *ante*, p. 35, and *post*, p. 115; and further, it is expressly provided by them, that nothing in this Act contained shall confirm or impair, or in any wise effect, or be construed to affirm or impair, or in any wise effect, the validity in law of any marriage solemnised beyond the sea, otherwise than is herein provided.²

But, according to principles of International Law, the English Court will consider invalid any marriage celebrated in a foreign country outside an embassy, consulate, or factory which is invalid by the law of the country.³ But an exception has been set up, that if the law of the country sets up an unreasonable restraint by fixing the age of majority at thirty, or a religious bar, by not allowing Protestants to marry, then it might be that a marriage of a British subject—good according to the Common Law, but invalid by the *lex loci*—would be recognised as good in England.⁴

¹ Continental chaplains are in the diocese of London, and by delegation of the Bishop of London they are under the pastoral charge of Bishop Wilkinson. Bishop Wilkinson kindly informed the author that he has issued a direction to such chaplains, that in celebrating marriages the *lex loci* must, of course, be always complied with.

² 12 & 13 Vict., c. 68, s. 21; 55 & 56 Vict., c. 23, s. 23.

³ See *post*, Chap. XVII, s. 2; and see note, *supra*.

⁴ *Middleton v. Janverin* (1802), 2 Hag. Con., 437; and see Hub-

As to marriages in barbarous and uncivilised countries, there is no doubt that, in such, a marriage according to the rites of the Church of England will be valid, see *ante*, p. 103; but it seems more doubtful whether a marriage in such barbarous and uncivilised country, celebrated either *per verbi de præsenti* or according to the local customs, will be valid, especially if such barbarous and uncivilised country recognises polygamy; see *ante*, p. 33, Polygamy, and *post*, Chap. XVII, s. 2 (a), International Law.

(c) *On High Seas*

The Marriage Acts, as before explained, only applying to England, and no municipal law, no *lex loci*, either foreign or colonial, being in force on the High Sea, marriages at sea on board British ships, whether men-of-war or merchantmen, are regulated by the old Common Law previously explained, see p. 103.

Therefore a marriage at sea on such British man-of-war or merchantman, solemnised by a minister of the Church of England, seems to be certainly valid at Common Law, though no actual case has so decided it.

As to marriages *per verba de præsenti*, such, according to the case previously cited, are said at Common Law to be valid in case no minister of the Church of England is available, see *ante* (a), p. 103; and therefore, applying this principle, a marriage at sea *per verba de præsenti*, as, e.g.,

back on Succession, *ubi sup.*, and cases collected in Waddilove's Digest, tit. Marriage, xii.; Shelford in Marriage and Divorce, tit. Foreign Marriages, ss. 6, 7, and 8. *Lacon v. Higgins* (1822), 2 D. & R., Appendix 38, where a marriage in a hotel at Versailles, according to the rites of the Church of England, by a clergyman, was held invalid as nonconforming to the *lex loci*; and see *in re Alison's Trusts* (1874), 31 L. T., 638, where a marriage of two Protestants in Persia by a Roman Catholic priest was held invalid because contrary to *lex loci*; and see *ante*, p. 78.

sometime happens by the captain reading over the marriage service, or by the parties exchanging consent otherwise, privately or publicly, would seem to be valid, whether such marriage be on a man-of-war or a merchantman.¹

And by statute, the Consular Marriage Act, 1849, expressly validates "all marriages, both or one of the parties being subjects of this realm, which before the passing of this Act have been solemnised . . . on board a British vessel of war on any foreign station by a minister in holy orders according to the rites and ceremonies of the Church of England . . . or by an ordained minister of the Church of Scotland . . . and all marriages of the like parties solemnised according to any religious rites and ceremonies, or contracted *per verba de præsenti* . . . on board a British vessel of war on any foreign station in the presence of the officer commanding such vessel," unless such marriage had been previous to that Act declared invalid by a Court of competent jurisdiction, or either of the parties has intermarried with any other person.²

And another Act, passed in 1879, validates marriages solemnised previous to the Act on board Her Majesty's vessels on a foreign station in the presence of the officer commanding, whether according to any religious ceremony or *per verba de præsenti*; but both of the parties must have been British subjects.³

And the Foreign Marriage Act, 1892, provides for future marriages between parties, one of whom, at least, is a British subject, on board Her Majesty's vessels on a foreign station.⁴

¹ But one Irish case has decided that a marriage on board a transport by the civil commander between a soldier and a woman was invalid; see *Du Moulin v. Druitt* (1860), 13 Ir. C. L., 212.

² 12 & 13 Vict., c. 68, s. 20.

³ 42 & 43 Vict., c. 29.

⁴ 55 & 56 Vict., c. 23, s. 12; and see the Order in Council, s. 12,

As to marriages on board British merchant vessels, the Merchant Shipping Act, 1854, provides, s. 282 (8), that the master shall enter in the official log-book every marriage taking place on board, with the names and ages of the parties; and by s. 273 (10), shall send in those particulars of the marriage, with the date, to the Board of Trade.¹

(d) *In the Colonies and India*²

The Colonists took out with them the Common Law of England as regards marriages, and such law is in force in the Colonies in so far as it is not altered by their own municipal law.

And a marriage good at Common Law will be valid although contravening such local law, unless such local law creates an express statutory nullity.³

So, as regards India, a marriage in 1808 by a Roman Catholic priest at Madras in a private house, without the Governor's licence, was held good;⁴ and in 1834, when an officer married at Surat, in the Bombay Presidency, *per verba de præsenti*, it was held good.⁵

And in Australia, when a man married at Sydney, *per verba de præsenti*, in 1835, it was held good.⁶

made November 24, 1891, published in Statutory Rules and Orders, p. 518.

¹ 17 & 18 Vict., c. 104.

² For local and colonial law, see Hammick on Marriage, App. XIII. As to India, see Second Report of Commissioners on the Law of Marriage, Parl. Paper, 1850 [1203]. Marriages in India are now regulated by two Indian Acts of 1872, cc. 3, 15. As to English Acts applying to India, see "Collection of Statutes Relating to India," 2 vols. and sup.; and for English and Indian Acts, see "Index to Enactment Relating to India;" and see *ante*, p. 32. As to registers, see *post*, p. 137.

³ *Caterall v. C.* (1847), 4 N. of C., 222; *ib.*, 466; 1 Rob., 304, 580; *Lautour v. Teesdale* (1816), 8 Taunton, 830. The *Lauderdale Peerage* (1885), 10 App. Ca., 692.

⁴ *Lautour v. Teesdale*, *ubi sup.*

⁵ *Maclean v. Cristall* (1849), 7 N. of C., Sup. XVII.

⁶ *Caterall v. C.*, *ubi sup.*

Also in the Colony of New York, in the case of an officer on service there being married in 1772 by an ordained clergyman, but without banns or licence, it was held good, and the issue of that marriage entitled to the peerage;¹ and a marriage at Norfolk Island in 1842 by a clergyman in a room was held good.²

It seems that the governor of a Colony has the ecclesiastical power of an ordinary, and can grant marriage licences.³

It does not seem certain whether it is incumbent to prove the colonial law, or whether the Court will take judicial notice that the Common Law exists in that Colony, unless the contrary is proved.⁴

It is beyond the scope of this work to further discuss colonial marriages;⁵ as to the validity in England of marriages in Australia, or with a deceased wife's sister, see *post*, Chap. XVII, s. 2 (*b*).

By the Foreign Marriages Act, 1892, a Governor or High Commissioner of a Colony may be constituted by a Secretary of State a marriage officer, to solemnise marriages under that Act.⁶

¹ The *Lauderdale Peerage*, *ubi sup.*

² *Limerick v. L.* (1863), 4 Sw. & Tr., 252.

³ *Basham v. Lumley* (1829), 3 C. & P., 489; and see *Ward v. Day* (1849), 7 N. of C., 96.

⁴ *Burt v. B.* (1860), 29 L. J., P. & M., 133; *Limerick, Countess of, v. Limerick, Earl of* (1863), 4 Sw. & Tr., 252; *Ward v. Day* (1846), 5 N. of C., 66.

⁵ For a collection of Imperial Acts dealing with regulations and validating marriages in particular Colonies, see Shelford on Marriage, pp. 43-62; for a collection of Colonial Acts, see Hammick on Marriage, App. XIII.

⁶ 55 & 56 Vict., c. 23, s. 11 (2) *c*; and see the Order in Council there under s. 11, published in the Statutory Rules and Orders, 1891, p. 518.

SEC. 6.—MARRIAGES OF THE ROYAL FAMILY ¹

The marriages of any of the Royal Family are specially exempted from the old Marriage (Lord Hardwicke's) Act,² and from the present Act regulating Church of England marriages,³ and also from the Nonconformist Marriage Act;⁴ and so it is not possible for "any of the Royal Family" to be validly married according to the Nonconformist rites, or in the office of a superintendent-registrar.

Therefore their marriages are regulated by old Common and Canon Law in force previous to Lord Hardwicke's Act, which practically so far as validity required only the Church of England marriage service, or rather that part of it that was essential to be said before and by an ordained clergyman.⁵

They are therefore free from the requirements laid down by the Marriage Acts, and, as a matter of fact, the marriage of the Princess Louise, Marchioness of Lorne, the Duke of Connaught, the Duke of Albany, were solemnised after twelve o'clock;⁶ and so it seems they can validly intermarry without banns or licence, and in a place where marriages could not otherwise be solemnised, *i.e.* a private room or chapel not licensed for marriages; but a prudent clergyman would refuse, unless a special licence⁷ had been obtained, to marry such Royal person

¹ Charles II was married at Portsmouth, and his marriage entered on the register; see Burn's Parochial Registers, p. 161. As to Royal marriages by proxy, see *ante*, p. 22, n. 2, and App. 4.

² 26 Geo. II, c. 33, s. 17; see *ante*, p. 12.

³ 4 Geo. IV, c. 76, s. 30.

⁴ 6 & 7 Will. IV, c. 85, s. 45.

⁵ *R. v. Millis* (1844), 10 Cl. & F., 534; *Beamish v. B.* (1861), 9 H. L. C., 274, where the old Common Law previous to Lord Hardwicke's Act is explained.

⁶ London Gazette (1871), March 24, p. 1587; (1879), March 17, p. 2219; (1882), May 2, p. 1971.

⁷ It is believed, however, that it is the invariable practice to obtain

without banns or licence, or outside a church, or he might run the risk of suspension "*per triennium ipso facto*," imposed on a clergyman for such a breach of ecclesiastical law.¹

The Foreign Marriage Acts, 1849–1891, and the Foreign Marriage Act, 1892 (as to its provisions, see *ante*, pp. 108–110), do not apply to the marriage of any of the Royal Family.²

The exemption from the Marriage and Foreign Marriage Acts clearly applies though only one of the parties is Royal.

As to registration of Royal marriages, the Royal Marriages Act, 1772, 12 Geo. III, c. 11, see *infra*, provides for the consent being set out in the *register of marriage*.

There is a Royal Register kept in the Lord Chamberlain's Office, and utilised whenever a marriage takes place in the Royal Family. The entries are not drawn up in specific form, and the signatures appended to a single entry extend over two or three pages.³ And in practice the marriages of Princess Louise, Marchioness of Lorne, the Duke of Connaught, and the Duke of Albany, were entered in the register, signed, and attested.⁴

The old registry of Royal marriages at the Chapel Royal, St. James', is in the custody of the Bishop of London, as Dean of the Chapel Royal.⁵

a special licence for marriages of the Royal Family; and the Royal Marriage Act, 12 Geo. III, c. 11, directs that the consent therein referred to shall be set out in the licence of marriage.

¹ See Canons 61, 62.

² 12 & 13 Vict., c. 68, s. 21, and 55 & 56 Vict., c. 23, s. 23.

³ Communicated to the author by The Very Rev. Randall Davidson, Dean of Windsor; and see App. I, as to St. George's Chapel, Windsor, where most Royal marriages take place; and see the account in the London Gazette of persons signing the register, detailed in note 4, p. 117.

⁴ London Gazette, see note 4, p. 117.

⁵ Burn's Parish Registers, p. 148.

In 1772, in order to hinder disparaging alliances, there was passed the Royal Marriages Act,¹ providing "that no descendant of the body of his late Majesty, King George the Second, male or female (other than the issue of princesses who have married or may marry into foreign families), shall be capable of contracting marriage without the previous consent of his Majesty, his heirs or successors, signified under the Great Seal and declared in Council² (which consent to preserve the memory thereof is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council); and that every marriage or matrimonial contract of any such descendant without such consent shall be null and void to all intents and purposes whatever."

This Act applies whether the marriage takes place in England or elsewhere. For in 1793 the Duke

¹ 12 Geo. III, c. 11. At Common Law and by the prerogative of the sovereign there appertains to the sovereign the right of disposing in marriage of his own descendants, as was stated in 1718 by ten out of the twelve judges, 14 State Trials, 1295; and apparently the sovereign could control the marriages of other branches of the Royal Family; and so Charles II gave Princess Mary, his niece, in marriage to the Prince of Orange without the consent or knowledge, and against the will, of her father, the Duke of York; and the Countess of Shrewsbury was proceeded against for assisting Lady Arabella Stewart, one of the Royal Family, to marry Lord Hertford's son without the consent of James I; see 12 Coke's Reports, 94. But when the Royal Marriage Act was introduced into Parliament, it was stoutly opposed in both Houses. Cobbett's Parliamentary History, vol. xvii., pp. 383-424, 447; and see the Lords' Protests, Annual Register, 1772. The Act was probably occasioned by the marriage in 1771 of the King's brother, the Duke of Cumberland, with Mrs. Horton, widow of Christopher Horton, and daughter of Lord Irnham. The Duke of Gloucester had previously, in 1766, married the Countess of Waldegrave, and announced it in 1771.

² These consents to marriages of members of the Royal Family are published in the Gazette, but have not been indexed; see index to London Gazette, 1830-1833, tit. Royal Family.

of Sussex went through, at Rome, a form of marriage according to the rites of the Church of England, which, but for the Royal Marriage Act would have been valid, with Lady Augusta Murray, daughter of Lord Dunmore; but a suit having been brought in the Arches Court by the King's Proctor, the Dean declared the marriage null and void;¹ and when, after the Duke's death, a son of that marriage claimed to succeed to the peerage, the Committee of Privileges held the marriage void, and the claim not made out.² The Act further provides,³ "That in case any such descendant of the body of his late Majesty, King George the Second, being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the king, his heirs or successors, that then such descendant upon giving notice to the King's Privy Council, which notice is hereby directed to be entered in the books thereof, may, at any time after the expiration of twelve calendar months after such notice given to the Privy Council as aforesaid, contract such marriage: And his or her marriage with the person before proposed and rejected may be duly solemnised without the previous consent of his Majesty, his heirs or successors, and such marriage shall be good, as if this Act had never been made, unless both Houses of Parliament shall, before the expiration of twelve calendar months, expressly declare their disapprobation of such intended marriage." Further, by way of punishment, it is enacted that⁴ "every person who shall knowingly and wilfully presume to solemnise, or to assist, or to be present at the celebration of any marriage with any such

¹ *Heseltine v. Murray* (1794), 2 Adams, 400, n.

² *The Sussex Peerage* (1844), 11 Cl. & F., 85, and App.

³ S. 2.

⁴ S. 3.

descendant, or at his or her making any matrimonial contract, without such consent as aforesaid first had or obtained except in the case above-mentioned, shall, being duly convicted thereof, incur and suffer the pains and penalties obtained and provided by the Statute of Provision and Præmunire made in the sixteenth year of the reign of Richard the Second." This Act, it will be seen, does not apply to the issue of princesses married into foreign families, *e.g.* the Empress Frederick of Germany, but applies to all other descendants of George II, including, therefore, the issue of the late King of Hanover, *i.e.* Princess Frederica and her issue, and the Duke of Cumberland and his issue,¹ and, of course, to the Duchess of Fife's issue.

Even the Sovereign and all other Royal persons are bound by the Common Law of Marriage, *e.g.*, as regards monogamy.²

¹ The consent of the Queen in Council was given on Nov. 27, 1878, to the marriage of the Duke of Cumberland with the Princess Thyra of Denmark, London Gazette, 1878, Dec. 6, p. 6987.

² So Henry VIII obtained a legal decree of nullity of marriage from Catherine of Aragon, 1 State Trials, 299, 28 Hen. VIII, c. 7, s. 9, see App. 5; from Anne Boleine, see 28 Hen. VIII, c. 7, ss. 3, 8, 10; from Anne of Cleves, 32 Hen. VIII, c. 25. George IV. in 1820 promoted a bill for a Parliamentary Divorce from Queen Caroline.

CHAPTER III

PROOF OF MARRIAGE AND LEGITIMACY¹

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SEC. 1.—PROVING MARRIAGES

(a) *Jurisdiction*

ORIGINALLY the lawfulness of marriage was a matter of ecclesiastical cognisance.¹ And therefore in real actions, *i.e.* actions relating to land, when a question of validity of marriage is raised by a plea of "*ne unque accouple* in loyal matrimony," or of general (but not special) bastardy, a return had to be made where and in what diocese the marriage took place, and then the Temporal Court would not try the matter itself, but a writ issued to the bishop of the diocese requiring him to try the matter, and certify the lawfulness of the marriage to the King's Court. But if the marriage took place outside England, the lawfulness of the marriage would be tried in the Temporal Courts with a jury. There were also certain other exceptions, particularly special bastardy, in which the marriage was triable by the country and not by the bishop.²

¹ See *ante*, Chap. I, p. 1.

² Roscoe's Real Actions, vol. i., p. 220; *Gray's* case (1572), 3 Dy., 305, p. 313*a, b*, 368*b*; *Robins v. Crutchley* (1760), 2 Wilson, 127; *Ilderton v. I.* (1793), 2 H. Bl., 145; *Kenn's* case (1607), 7 Co. Rep., 42*b*. Year Book, 11 & 12 Ed. III, Rolls Series, p. xxiv.; and see Law Dictionaries by Bouvier, Burrill, and Wharton, tit. *Ne unque accouple*; Chitty on "Pleading," 7th ed., vol. iii., p. 579; Britton, by Nicholls, tit. Marriage; and see per Lord Penzance, *A. v. B.* (1868), L. R., 1 P. & M., 559, and quoted *post*, Chap. VI, Nullity of Marriage, s. 1 (b); and see 25 Ed. III, Stat. 1.

But in personal actions the fact of coverture is triable at common law.¹

But real actions are now either abolished or the procedure assimilated to ordinary actions; in practice, the fact of marriage is always triable and tried in the Court in which it arises, and every Court is competent. And so in a bill for dower, where there was a plea of *ne unque accouple*, the issue was tried before the full Court;² and the old practice usual in the Court of Chancery, of directing issue to be tried at law before a jury, is now obsolete.³ In fact, in settlement cases the question of validity of marriages is continually tried by Justices of the Peace; and in a case of disputed and difficult law which Justices, acting on the advice of their clerk, refused to try, mandamus went to compel them to try it.⁴

When legitimacy or validity of marriage is the direct object of the suit, the jurisdiction is the Probate and Divorce Division in a suit for nullity or for a declaration under the Legitimacy Declaration Act. The Court has jurisdiction wherever the marriage took place, whether in England or abroad; see Chap. VI, s. 1 (*b*) (*c*), and *post*, pp. 132, 224, 225.

(*b*) *Burden of Proof*

Every person setting up a marriage is bound to prove it; he is subject to "the burden of proof." So where a party set up relationship to a deceased intestate as against the Crown claiming on an intestacy, the burden of proof is on the claimant setting up the relationship.⁵ But this

¹ *Fletcher v. Pynsett* (1606), Cro. Jac., 102; *Norwood v. Stevenson* (1738), Andrews, 227. ² *Poole v. P.* (1831), Younge, 331.

³ *Revel v. Fox* (1751), 2 Ves., 269, and Smith, Chancery Practice, 1st ed., vol. ii., p. 67; but now see Annual Practice, Ord. xxx. r. 1, notes.

⁴ *R. v. J. J. Cumberland* (1836), 4 A. & E., 695.

⁵ *Dyke v. Williams* (1862), 2 Sw. & Tr., 491; (1871), L. R., 2 P. & M., 239; but the claimant is entitled to the benefit of the presumption, pp. 139, 140.

proof of marriage is much aided by the legal presumptions that have been established. One of these is that when it has once been proved that a marriage *de facto* has been gone through, a very strong presumption arises, *omnia rite esse acta*,—a presumption that requires very strong evidence to disprove it, see *post*, p. 142 ; and the other, a weaker presumption, that when man and woman cohabit as, and are reputed husband and wife, they are married ; see *post*, pp. 139–142.

Where a presumption arises, the burden of proof shifts, and it is for the other side to rebut the presumption.

(c) *Strict Proof when necessary*

In some cases, however, strict proof is required.

Bigamy Prosecutions.¹—Here the proof of the first marriage is *strictissimi juris*.² So a marriage in fact must be proved ; neither acknowledgment nor cohabitation nor reputation are sufficient. It will not be presumed.³

But if once a marriage *de facto* be proved, then the presumption *omnia rite esse acta* will apply ; so if a ceremony be proved by witness or registration, it is unnecessary to prove that banns or licence for the marriage had been published or obtained, or that the church or chapel in which the marriage took place was duly registered or licensed for marriages, for this will be presumed.⁴ If, however, a “wilful knowing” undue publication of banns by one party is proved, the burden of proof is then on the

¹ See *post*, Chap. XV, s. 3.

² *Smith v. Huson* (1811), 1 Phillim., 287, p. 314.

³ *Hawkins' Pleas of the Crown*, vol. i., p. 323 ; Archbold & Roscoe, tit. Bigamy.

⁴ *R. v. Allison* (1806), R. & R., 109 ; *R. v. Clark* (1847), 2 Cox C. C., 183 ; *R. v. Hawes* (1847), 1 Den., 270 ; *R. v. Cradock* (1863), 3 F. & F., 837 ; *R. v. Creswell* (1876), 1 Q. B. D., 446 ; and see *ante*, pp. 36, 44, 46, 56, 83, 85, 86, 90, 91, and *post*, s. 4 (a) (c).

prosecution to show that the other party was ignorant of such undue publication, in order that a valid marriage may be proved.¹

But in favour of the prisoner, he will be allowed to set up a prior marriage by cohabitation and repute, so as to invalidate that charged against him as the first; and the prisoner will be here allowed the benefit of presumption, and is not held to strict proof.²

Also in favour of the prisoner if previous to the first marriage which the prosecution set up as valid, *e.g.* a marriage with Charlotte Georgina Sawers in 1879, after which the prisoner married, in 1880, Edith Maria Miller, the prisoner sets up an existing marriage prior to that in 1879, being a marriage in 1864 to Ellen Earle, and it is proved Ellen Earle was alive in 1868, but there is no further evidence as to her existence, then it is an open question for the jury whether Ellen Earle was alive in 1879, and therefore the marriage in 1879 invalid.³

Two conflicting Marriages.—Where marriage is set up to invalidate a second actual marriage, strict proof is necessary, and presumption cannot by law be made in favour of the first marriage; ⁴ but once the first marriage is proved *primâ facie*, as by production of certificate of marriage, the burden of proof shifts on those setting up the second marriage to invalidate the first by rebutting

¹ *R. v. Kay* (1887), 16 Cox C. C., 292; see *ante*, pp. 38-41.

² *R. v. Wilson* (1862), 3 F. & F., 119; this rule, however good *in favorem libertatis*, interferes with the rule as to two conflicting marriages above stated; as to this presumption, see *post*, s. 4 (a) (b).

³ *R. v. Willshire* (1881), 6 Q. B. D., 366; as to this presumption, see *post*, s. 4 (d).

⁴ *Taylor v. T.* (1754), 1 Lee, 571, 2 *ib.*, 274; and see Lord Blackburn's judgment in *Dysart Peerage* case (1881), 6 App. Ca., 489, p. 510, that there is a presumption a man would not commit bigamy.

evidence.¹ This, of course, supposes that the two marriages are coexisting, *i.e.* the "other party" to the first marriage is not dead at the time when his or her spouse remarried. If such "other party" has disappeared and not come back, the validity of the second marriage depends on the presumption of the death of the "other party," and that the presumption that the "spouse" would not commit bigamy; see *post*, s. 4 (*d*), p. 144.

Further, strict proof is required of the identity of the parties, *i.e.* that it is the same spouse who has been twice married.²

Divorce.—In the old actions of criminal conversation, marriage in fact had to be proved, cohabitation and reputation were not sufficient;³ and the Divorce Act, 1857, 20 & 21 Vict., c. 85, by s. 33, provided that a claim for damages against a co-respondent to a petition should be heard and tried on the same principles and subject to the same or like rules and regulations as actions for criminal conversation. So where damages are claimed against a co-respondent in a divorce action, it would appear that the marriage must be strictly proved, see *post*, p. 255.

Except in such case of damages a marriage proved by cohabitation and repute⁴ is enough to give the Court jurisdiction in action for judicial separation or dissolu-

¹ *Haviland v. Mortiboy* (1858), 4 Jur., N. S., 842; *Hamblin v. Shelton* (1862), 3 F. & F., 133.

² *Searle v. Price* (1816), 2 Hag. Con., 187; *Bayard v. Morpheu* (1815), 2 Phillim., 321; but in one case proof of identity by a photo. was admitted; *R. v. Tolson* (1864), 4 F. & F., 103; and see Dixon on Divorce, 2nd ed., pp. 322-324; and see *post*, s. 3 (*b*), p. 137, and Chap. VII, s. 5 (*b*).

³ *Morris v. Miller* (1767), Burrows, 2057; *Hemmings v. Smith* (1784), 4 Doug., 33; *Bain v. Mason* (1824), 1 C. & P., 202. As to co-respondents, see *post*, Chap. VII, s. 2 (*f*).

⁴ *Patrickson v. P.* (1866), L. R., 1 P. & M., 86; *Rooker v. R.* (1863), 3 Sw. & Tr., 526.

tion of marriage, though it is said that in action for restitution of conjugal rights strict proof of marriage must be forthcoming;¹ but if not sufficient that the respondent should admit the marriage, it must be proved at the trial.²

Coverture.—Coverture may be alleged either by a plaintiff against a husband in an action seeking to render him liable for his wife's debts, or as a defence by a married woman sued as a *feme sole*.

In the former case the plaintiff is not held to strict proof, but in the latter the married woman is held to proof of marriage nearly if not quite as strict as in bigamy.³

In the County Court coverture is one of the special defences of which notice must be given;⁴ and by the County Court rules the defendant must state the date and place of her marriage, and her husband's name and address.⁵

Coverture is sometimes set up in defence of a female prisoner to prove she was married, and therefore acted under husband's coercion, see *post*, Chap. IV, s. 1 (a); in this case such female prisoner is not held to strict proof.⁶

Pedigree Cases.—In proof of a claim as heir or next of kin, the suitor is entitled to the benefit of all the presumptions, even although the parent of such suitor may be alive and might be called.⁷

¹ See Dixon on Divorce, p. 325, Browne & Powles, 2nd ed., and Shelford on Divorce; as to this action, see *post*, Chap. X, s. 1.

² Dixon, p. 294; and see *post*, pp. 247, 248, 267, 285.

³ See Chitty on Contracts, 12th ed., pp. 254, 256, 257; and see *Cunnam v. Farmer* (1849), 2 C. & K., 746.

⁴ 51 & 52 Vict., c. 43, s. 82.

⁵ Order X, rule 13.

⁶ *R. v. Woodward* (1838), 8 C. & P., 561; *R. v. Hassall* (1826), 2 C. & P., 434; *R. v. Torpey* (1871), 12 Cox C. C., 45; 1 Russ. Cri., 5th ed., pp. 153, 154.

⁷ *Doe dem, Fleming v. Fleming* (1827), 4 Bingham, 266; see *post*, p. 139.

As to suits under the Legitimacy Declaration Act, 1858, see Chap. VI, s. 1 (c), p. 225.

And there is a familiar rule of law in what is known as pedigree cases, which admits the statement of a deceased relative of the family as evidence of the pedigree.¹

Settlement Cases.—In a dispute as to settlement of a pauper by marriage, the union setting up the marriage is entitled to the benefit of the presumption.²

SEC. 2.—JUDGMENT AND ESTOPPEL³

(a) Generally

The question here treated is how far a decision by one Court that a marriage is or is not valid prevents another from reconsidering the validity of that marriage, but compels it to accept it as conclusive as to its validity. This depends on the principles of the juristic doctrines of estoppels by record or *res judicata*, which is divided into *judgments in rem* and *judgments in personam* or *inter partes*, there are also estoppels by deed and stoppels *in pais*.⁴

Judgment in rem.—The distinction between a *judgment in rem* and a *judgment in personam* or *inter partes*, is that the former being a solemn declaration upon *status* is conclusive as against all the world; as *judgment in*

¹ *Maule v. Mounsey* (1844), 1 Rob. 40; *Webb v. Haycock* (1854), 19 Beav., 342; *Smith v. Tebbitt* (1867), L. R., 1 P. & M., 354; and see *post*, p. 138.

² *St. Devereux v. Much Dean Church* (1762), 1 William Blackstone, 367.

³ See *post*, Chaps. V and VI, pp. 217, 219, 234, 285.

⁴ As to an estoppel by deed, see a case where next of kin of a deceased after admitting by deed that the defendant administratrix was the intestate's widow, were yet enabled subsequently to prove that she was not his wife because she was already married; *Haviland v. Mortiboy* (1858), 4 Jur., N. S., 842.

personam or *inter partes* is only conclusive upon parties and privies. But in either case it must be the judgment of a competent Court, and is only conclusive on what is in issue and material.¹

(b) *Order of Sessions*

As to what are Judgments in rem.—An order of sessions in a settlement case where the pauper's settlement depends on the validity of her marriage, or on his or her legitimacy, is a judgment *in rem*, and conclusive as to the validity of that marriage, not only as between the unions or parishes litigating, but as against the issue and all the world.²

(c) *Judgment of Ecclesiastical or Divorce Court*

Also the judgment in favour of the validity of a marriage by the Ecclesiastical Court, and therefore it would appear by its successors, the Divorce Court and the Probate and the Divorce Division of the High Court, is, except in a suit for *jactitation*,³ a judgment *in rem*, and therefore conclusive against all the world.⁴

¹ Though estoppels are described by Lord Coke, C. J., as "a curious and excellent sort of learning," and defined as "where a man is concluded by his own act or acceptance to say the truth," they are a highly technical branch of the law, and not here further treated of; but the reader is referred to the *Duchess of Kingston's* case, Sm. L. C.; and see, too, Chitty on Contracts, 12th ed., tit. Judgment and Estoppel; Broom's Legal Maxims and the Law Dictionaries; as to the effect of foreign judgments, see *post*, Chap. XVII, s. 4.

² Per Lord Denman, C. J., in *R. v. Wye* (inhabitants of) (1838), 7 Adolphus & Ellis, 761; and see cases there cited.

³ *Duchess of Kingston's* case (1776), 20 State Trials, 355; actions for *jactitation* lie where a person boasts that he or she is married to another whereby a reputation of their marriage may ensue, and the suitor claim that perpetual silence may be enjoined on the boaster; and see *post*, Chap. X, s. 2.

⁴ *Ib.*, and per Sir J. P. Wilde, now Lord Penzance, *A. v. B.* (1868), L. R., 1 P. & M., 559, quoted *post*, Chap. VI, Nullity of Marriage, ss. 1 and 3 (c); and see *ante*, p. 2; *post*, pp. 217, 219, 234, 285.

So a sentence of nullity and a sentence on affirmance of marriage has been received as conclusive evidence in a question of legitimacy arising incidentally upon a claim to real estate ; and a sentence of nullity is equally evidence in a personal action against a defence founded upon a supposed coverture.¹

But such sentence in affirmance of marriage is not conclusive in a criminal proceeding either as against or in favour of the Crown in criminal proceedings for, *e.g.*, bigamy ;² however, a sentence of divorce is by statute, 1 James I, c. 11, conclusive in prosecution for bigamy ;³ as effect of conviction for bigamy, see *post*, p. 132.

Collusion.—Such sentence may be impeached on the ground of collusion between the parties and fraud on the Court.⁴ So where Lord Stowell had in 1816 pronounced a marriage null and void because of the banns being fraudulently published in the wrong names,⁵ and in 1842 the issue born in 1817 of the marriage declared void, applied on the footing that the marriage was valid notwithstanding the sentence, which it was alleged was obtained by witnesses being withheld or not produced, the Privy Council decided that such allegation was not sufficient to impeach the sentence, collusion therein not being set up or proved ;⁶ and the matter being re-tried in the Court of Chancery upon exceptions to a Master's report, the Master of the Rolls, Lord Langdale, held that the issue of the marriage was bound by the sentence,

¹ Per Sir W. de Grey, C. J., the *Duchess of Kingston's* case, *ubi sup.* ; *Bunting v. Lepingwell* (1585), 4 Co. Rep. 29a ; see *Lockyer v. Ferryman* (1877), 2 App. Ca., 519.

² *Ib.*, see *ante*, p. 130.

³ *Bunting's* case, 4 Coke 29a, (n) B ; see *post*, Chap. XV, s. 3.

⁴ *Ib.*, and *Meddowcroft v. Huguenin* (1844), 4 Moore P. C., 386, per Lord Brougham.

⁵ *Meddowcroft v. Gregory* (1816), 2 Hag. Con., 207.

⁶ *Meddowcroft v. Huguenin*, *ubi sup.*

because matters amounting to fraud on the Court and collusion between the parties was not alleged.¹ But where the suit was fraudulently and collusively instituted (a declaration of intention to appeal appended to the end of the sentence being characterised by the Lord Justices as the double hatching of a fraud), on which suit the Bishop of Winchester's Court in 1802 annulled the marriage, in 1853 the Lords Justices in Chancery declared the marriage good and the issue legitimate, so as to claim as next of kin.² But it appears that short of proving fraud on the Court and collusion between the parties, the issue of such marriage bastardised by the effect of the sentence has no means of showing that the sentence is erroneous,³ and the old doctrine, *sententia contra matrimonium nunquam transit in rem judicatam*,⁴ is not now law.

(d) *Decree under Legitimacy Declaration Act*

A decree under the Legitimacy Declaration Act, 1858,⁵ declaring the validity of a marriage, only binds parties cited and those claiming under parties cited, and does not prejudice any one if proved to have been obtained by fraud and collusion; and in any case is without prejudice to any prior judgment or decree by a competent Court.⁶

(e) *Conviction for Bigamy*

A conviction for bigamy does not, it appears, make the

¹ *Perry v. Meddowcroft* (1846), 10 Beav., 122.

² *Harrison v. Mayor of Southampton* (1853), 4 De Gex, M. & G., 137.

³ *Perry v. Meddowcroft*, *ubi sup.*

⁴ See *Kenn's case* (1617), 7 Coke, 42*b*; and see *post*, Chap. VI, Nullity of Marriage, s. 3 (c); but see *Lockyer v. Ferryman* (1877), 2 App. Ca., 519, 521, n.

⁵ 21 & 22 Vict., c. 93; for proceedings under this Act, see Chap. VI, s. 1 (c), p. 225.

⁶ *Ib.*, ss. 1, 8, and 10; and see *Shedden v. Patrick* (1860), 2 Sw. & Tr., 170.

second marriage conclusively void, but is only evidence against it; and even in case of the convicted prisoner suing for administration of the second spouse's effects, the validity of such second marriage can be set up.¹

And if the second spouse brings nullity, the defendant may still set up as a defence the invalidity of the first marriage, notwithstanding he may have been convicted of bigamy therefor.²

(f) Other Judgments

But all other judgments are merely *in personam*, and bind the parties only. So in an administrative suit in Chancery, the certificate as to the next of kin only bind the parties and those actually classed under; and other parties can reopen the litigation.³ The verdict of a jury of a manor is not evidence.⁴ As to the effect of foreign judgments, see *post*, Chap. XVII, on International Law, s. 4.

SEC. 3.—EVIDENCE OF MARRIAGE

(a) Registers

It is a principle of the Common Law of Evidence that official registers required by law to be kept for the public benefit are admissible as evidence of the truth of the relevant facts stated therein, without the person who

¹ Per Sir John Nicholl in *Wilkinson v. Gordon* (1824), 2 Add., 152; and see *Boyle v. B.* (1688), 3 Mod., 164; and see per Sir W. de Grey, laying down in the *Duchess of Kingston's* case, *ubi sup.*, that on a conviction for felony, yet a purchaser from a felon may traverse the felony; and see, too, in *re Ethel Brown* (1884), 13 Q. B. D., 614; a curious illustration of this point is given in Anthony Trollope's novel of John Caldigate; and see Dixon on Divorce, 2nd ed., pp. 322-324.

² *Bruce v. Burke* (1824), 2 Ad., 471.

³ *Spencer v. S.* (1871), L. R., 2 P & M., 230.

⁴ *Maule v. Mounsey* (1844), 1 Rob., 40.

made the entry swearing to it. It remains to consider what documents the law recognises as such official registers, and next, when the original itself must be produced, or when the entry can be proved, either by an examined copy, *i.e.* by a copy of the original made by the witness who swears to it in Court as being an exact copy of the original, or a certified copy, *i.e.* a copy taken from the original by the person in whose custody the original is, certified under his hand and seal as exact, he not coming into Court, but the certified copy being accepted. As to the latter point, although sometimes, as in peerage cases, the original register must be produced, yet usually a certified copy of the register from the minister of the parish in charge of it, or from the General Registry Office, is legal evidence.¹

But a certificate of marriage is not evidence unless it be shown as, and purports to be, a copy from the register, for a certificate is not evidence of a mere fact.²

But register of a marriage is not the best or necessary evidence of the marriage, because, "first, that registration is not necessary for the marriage itself; secondly, that no error or blunder in the register would affect the validity of the marriage; and, thirdly, that registration is not like an agreement or deed in writing, and the contents of which cannot be proved by *viva voce* evidence, but it is a mere record afterwards of what has been done, and no doubt a very important record to those who enter into the contract; but it is a mere memorandum of the compact they enter into, not the compact itself."³

Parish and Registrars' Registers.—The law recognises as such official documents, parish registers which were first

¹ 6 & 7 Will. IV, c. 86, ss. 35, 37, 38; and see Taylor on Evidence.

² *Nokes v. Milward* (1824), 2 Add., 386, p. 391.

³ *Woods v. W.* (1840), 2 Curt., 516, p. 522, per Dr. Lushington.

kept in accordance with Canon 70, and subsequently by statute, the present Act in force being 6 & 7 Will. IV, c. 86,¹ also the register of Nonconformist marriages solemnised by or in the presence of the registrar, and registered in accordance with that Act. As to how registration is effected, see *ante*, pp. 75-77, 93-97, 99-102.

Transcripts on Duplicate.—Further, originally by the canon and now by the 6 & 7 Will. IV, c. 86, and 7 Will. IV, and 1 Vict., c. 22, the parochial and registrars' registers are to be kept in duplicate, the duplicate being by the canon transmitted to the bishop, and by statute to the superintendent-registrar, and by them to the Registrar-General. These duplicates are also official documents within the above cited rule of evidence.²

Non-Parochial Registers.—These are such as registers in Church of England chapels, where it was not legal to solemnise marriages,³ *e.g.* the Fleet registers; and registers kept by the ministers of marriages in Nonconformist chapels. These registers were examined into by a Commission appointed in 1837,⁴ and such registers as were

¹ Previously regulated by Lord Hardwicke's Act, 26 Geo. IV, c. 33, ss. 14, 15; 4 Geo. IV, c. 76, ss. 28, 29, and s. 52 Geo. III, c. 146; and see Shelford on Marriage and Divorce, chap. ix., p. 806; and Burn's History of Parish Registers.

² They are now at the General Registry, under 3 & 4 Vict., c. 92; see Reports of Commission of 1837, pp. 11 and 16, and Schedule M thereto, and are admissible as evidence; and see Burn's Parish Registers, chap. ix., pp. 199-211, on Bishops' Transcripts; and see Doe on the demise of *Wood v. Wilkins* (1846), 2 C. & K., 328; and *Lloyd v. Passingham* (1809), 16 Vesey, 59; *Walker v. Countess Beauchamp* (1834), 6 C. & P., 552.

³ *Moysey v. Hillcoat* (1828), 2 Hag. Ecc. Cas., 30, p. 51. A list of chapels in which marriages were so celebrated, some of whose registers still exist, is given in Burn's Parish Registers, pp. 146-152.

⁴ See Report of this Commission on Non-Parochial Registers, Parl. Paper, 1837-38 [148], and Report of another Commission to the same object in 1857, published as a Parl. Paper, 1857-58 R. [233]. About 7000 registers were deposited in 1838, but few of the Nonconformist registers contained any marriages, as such marriages were by Lord

approved by them were deposited with the Registrar-General under the authority of 3 & 4 Vict., c. 92, and by that Act deemed to be in legal custody and receivable in evidence. But the marriage registers in the Fleet and King's Bench Prisons, at the Mayfair Chapel, and at the Mint in Southwark, dating from 1686 to 1754, which had been bought by the Government in 1821 and deposited in the Registry of the Bishop of London, and transferred by 3 & 4 Vict., c. 92, to the custody of the Registrar-General, were not receivable as evidence,¹ although Fleet marriages before Lord Hardwicke's Act were, if proved, clearly valid;² and the register, though not evidence as an official document, might be received as a declaration made at the time under the hand of the party;³ and a

Hardwicke's Act specially prohibited. A large number of marriage registers were transmitted to the Bishop of London's registry; these consisted of registers of marriages of British subjects beyond the sea in embassies and factories, and of transcripts from the original parish registers certified by the ministers, see pp. 11 and 16, Schedule M; and of the registers of the Fleet and King's Bench Prison, and Mayfair Chapel, not admissible, see pp. 111, 116, and Schedule N and O. In 1858 a further number of 292 registers were received, of which 124 were transmitted by the Quakers, who had refused to deliver them to the previous Commission, although Schedule P to that Commission gives an account of these registers.

¹ See the Register of Baptisms and Marriages at St. George's Chapel, Mayfair, edited by George J. Armitage, F.S.A., published by the Harleian Society, 1889. The marriages were celebrated by the Rev. Alexander Keith, and after he was sent to gaol, April 1743, by his assistants. Here were married the Duke of Hamilton and Miss Gunning, also the Duke of Cleveland; and see also history of the Fleet Marriages, by John Sotherndon Burn, and the Report of the Commission of 1838, pp. 11 and 16, and Schedule O, containing the Mayfair Chapel registers, and Schedule N, containing the Fleet registers, some of which are, however, outstanding. One is in the Bodleian.

² *Hervey v. H.* (1773), 2 W. Bl., 877; *Grant v. Grant* (1754), 1 Lee, 592, a suit for restitution, where marriage must be clearly proved; and see *Plunkett v. Sharp* (1754), 2 Lee, 35.

³ Per Lord Eldon, L. C., *Lloyd v. Passingham* (1809), 16 Vesey, 59; Doe on the demise of *Davies v. Gatacre* (1838), 8 C. & P., 578.

Nonconformist register not deposited under the last cited Act is not evidence.¹

Also registers of marriages abroad under the Consular Marriage Act, 1849, are evidence, and also registers of certain other marriages abroad deposited at the Registrar-General's Office under 3 & 4 Vict., c. 92, and mentioned in Schedule M to the Report of the Commission of 1838. As to registers of marriages abroad not so deposited, the Committee of Privileges refused to admit the register at the British Ambassador's Chapel in Paris;² but the full Court of Divorce admitted the copy of register of marriages in India, transmitted to the East India House, from the original kept by the secretary of the Company in India.³ The Foreign Marriage Act, 1892, directs that marriages solemnised thereunder shall be registered, and a copy sent to England.⁴ As to Scotch and Irish marriages and their registration, see *post*, Chap. XVIII, s. 3; Chap. XIX, s. 1 (c).

(b) *Identity of Parties*

There must be some proof of the identity of the person entered in the register as married with the person whose marriage is to be proved.⁵ Mere identity of name does not prove identity of parties;⁶ and, on the other hand, a

¹ *Newham v. Raithby* (1811), 1 Phillim., 315; *ex parte Taylor* (1820), 1 Jac. & W., 483; *Bramall v. B.* (1849), 6 N. C., 667; *Stockbridge v. Quicke* (1853), 3 Car. & K., 305; but if signed by the parties, such registers are evidence as a declaration of the party made at the time, and also as evidence of identity.

² *Earl of Athlone's claim* (1841), 8 Cl. & F., 262.

³ *Rutcliffe v. R.* (1859), 5 Jur., N. S., 714; as to marriages in 1850, see Second Report of the Commissioners on the Law of Marriage, Parl. Paper, 1850 [1203].

⁴ 55 & 56 Vict., c. 23, ss. 9 and 10; and see *ante*, pp. 108-110.

⁵ This subject is discussed at length in Hubback on Succession, p. 2, chap. vi., pp. 438-68.

⁶ So laid down by the House of Lords in *Draycott v. Talbot* (1718),

discrepancy in the names is not absolutely fatal. This identity may be proved in several ways, not only by producing the minister or clerk or witnesses subscribing the register, but even by the identity of handwriting of the parties whose marriage is proposed to be proved with that in which the register is signed, or in other ways.¹ In one case identification by a photograph was admitted.²

(c) *Proof of Ceremony by Witness*

It is not, however, necessary to produce a register or a certified copy to prove the marriage; the marriage may be proved by some person who was actually present and saw the ceremony performed, even though he was a mere stranger happening by chance to be in the church and remaining through curiosity.³

(d) *Statement of Deceased Relative*

In cases known as pedigree cases there is a rule of law admitting as evidence of pedigree, and therefore of marriage and legitimacy, the statement of a deceased relative of the family. But this rule is subject to conditions, viz., that the statement should be made *ante litem motam*, that the person making the statement must be a person who is dead; but a prior condition to

3 Brown's Parliamentary Cases, 564; but see *Hubbard v. Lees* (1866), L. R., 1 Ex., 255; *R. v. Simpson* (1883), 15 Cox C. C., 323; *Riggs Miller v. Wheatley* (1890), 28 L. R. Ir., 144.

¹ *Birt v. Barlow* (1779), 1 Doug., 170; *Hemmings v. Smith* (1784), 4 Doug., 33; *Bain v. Mason* (1824), 1 C. & P., 202; *Cripps v. Cripps* (1842), 1 Notes of Cases, 530; *Sayer v. Glossop* (1848), 2 Ex., 409; *Rooker v. R.* (1863), 3 Sw. & Tr., 526.

² *R. v. Tolson* (1864), 4 F. & F., 103.

³ So held by all the judges in a bigamy case, *R. v. Allison* (1806), R. & R., 109; *R. v. Munwaring* (1856), Dears & B., 132 (five judges present); *Earl of Athlone's case* (1841), 8 Cl. & F., 262; and see *Woods v. W.* (1840), 2 Curt., 516, 522, 523; and see *ante*, pp. 56, 57.

both of these is that it should be proved, and by some source of evidence independent of the statement itself, that the person making the statement was related to the family about which he or she spoke.¹

SEC. 4.—PRESUMPTION IN FAVOUR OF MARRIAGE

(a) Generally

A presumption has been defined² as a “rule of law that Courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.”

In other words, the burden of truth is shifted, and it is incumbent on the other side to bring evidence to rebut the presumption.

Marriage is favoured by the law, and the law presuming against vice and immorality *odioso et in honesta non sunt in lege presumenda*; so every presumption is in general raised in favour of marriage “*semper presumitur pro matrimonio ex.*”

And in a legitimacy case the House of Lords laid down “The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage. There is a strong legal presumption in favour of marriage, particularly after lapse of a great length of time, and this presumption must be met by a strong, distinct, and satisfactory disproof.”³ And there-

¹ *Smith v. Tebbitt* (1867), L. R., 1 P. & M., 354; and see *Hitchins v. Eardley* (1571), L. R., 2 P. & M., 248; the *Berkeley Peerage* case (1811), 4 Comp., N. P., 401; *Haines v. Guthrie* (1884), 13 Q. B. D., 818, C. A.; *re Turner* (1885), 29 Ch. D., 985; the *Loval Peerage* case (1885), 10 App. Ca., 763; and see Text-Books on Evidence.

² Stephens, Digest of Law of Evidence, pp. 2, 144.

³ *Piers v. P.* (1849), 2 H. L. Ca., 331; and see *Harrison v. Mayor of Southampton* (1853), 4 De Gex, M. & G., 137, App.; and so a marriage between a Jew and a Christian who, neither according to

fore in legitimacy cases it is not necessary to set out in pleading the date and place of the marriages whereon the legitimacy depends.¹ But this presumption does not apply in bigamy prosecutions and in other actions (see *ante*, pp. 125, 126), for the reason *inter alia* that there then arises a conflicting presumption of innocence.

(b) *Presumption of Marriage from Cohabitation and Repute*

Cohabitation and repute raises a presumption of marriage without direct proof of any ceremony gone through, in favour of children or others claiming under such marriage.² If a party to the alleged marriage being a witness gave evidence of an actual marriage *de facto*, then another presumption that such marriage was valid would arise, that of *omnia rite esse acta*, see *post*, p. 142.

The issue of such marriage may make use of the presumption although their parent, party to the alleged marriage, is alive and might have given direct evidence of actual marriage.³ But no case has yet arisen where a party to the marriage having to prove it, was able to rely on the presumption alone without swearing to or giving some evidence of a marriage *de facto* whereon he or she might use the presumption by way of corroboration, and the presumption was frequently used even between the parties to corroborate the validity of a marriage. It is proposed here to discuss what facts,

the Act of Parliament nor Jewish law could intermarry according to Jewish forms, see *ante*, p. 100, may be presumed; *Goodman v. G.* (1859), 5 Jur., N. S., 902.

¹ *Dyke v. Wallis* (1862), 2 Sw. & Tr., 466.

² *St. Devereaux v. Much Dean Church* (1762), 1 W. Bl., 367; *Hervey v. H.* (1772), 2 *ib.*, 877; *Read v. Passer* (1794), 1 Esp., 213; *Leader v. Barry* (1795), 1 Esp., 353; *Goodman v. G.* (1859), 28 L. J. Ch., 745; and per Lord Cranworth in the *Breadalbane* case (1867), L. R., 1 H. L. Sc., 182, p. 199.

³ *Doe on the demise of Fleming v. F.* (1827), 4 Bingham, 266.

without any proof of an actual ceremony *de facto*, will raise the presumption of marriage. And it should be remembered that it is an English marriage that is here being discussed, not a Scotch marriage, of which a presumption arises on much slighter grounds; see *post*, Chap. XVII, s. 2, where Scotch irregular marriages are discussed. Therefore when the habit and repute is not sufficient to prove a Scotch marriage, it is an *a fortiori* case that it would not support an English marriage; and in this way Scotch authorities are sometimes referred to.

There are three different facts which, conjoined together, raise this presumption, though it has never been decided that one, or at any rate two, of these states of fact without the third will be insufficient to raise the presumption.

These three facts are "cohabitation," "owning" by one or both of the parties that they were married, and "repute," such as being received by relations and respectable families as married.

Firstly, *As to Cohabitation*.—Cohabitation alone creates a very strong presumption where the woman's character is unblemished, because the law would not suppose a woman, whose character in general was virtuous, would live with a man as her husband who was not so; but no such presumption could be made where the woman appeared to be a common prostitute.¹

Secondly, *By Owning and Acknowledgment*.²—This by itself is little, for it may be merely to cover an irregular connection; the value of it as evidence greatly depends on the person to whom, and on the circumstances under

¹ Per Sir George Lee in *Conran v. Lowe* (1754), 1 Lee, 630, p. 638; and see *Woodgate v. Potts* (1847), 2 C. & K., 457.

² *R. v. Woodward* (1838), 8 C. & P., 561; *Plunkett v. Sharpe* (1754), 2 Lee, 35; *Hervey v. H.* (1773), 2 W. Bl., 877.

which, it is made. For "when a man takes his mistress with him to an hotel, or goes with her to a shop to buy baby linen, the probability is that he will prefer describing her as his wife to explaining her true position."¹

The baptism of children as legitimate is a strong evidence of marriage at time of baptism,² for an acknowledgment of his child as legitimate by a parent is strong evidence in favour of validity of the marriage of such parent.³

Also a forced declaration by the wife denying the marriage is a strong circumstance in favour of the marriage.⁴

Thirdly, *By Repute*.—This coupled with cohabitation is most powerful evidence. It is evidenced by such acts as being presented at Court, reception by female relations, attending church together, and being generally received by respectable persons as man and wife.⁵ And this repute may establish a marriage even though the repute be divided.⁶

(c) *Presumption that omnia rite esse acta.*

It is here supposed in this subsection that some ceremony has been proved or admitted to have been performed by a person acting apparently as a clergyman or public officer, which one or both of the parties took to be a marriage solemnised by a competent clergyman or public officer.

¹ Per Lord Watson in *Dysart Peerage* (1881), 6 App. Ca., 489, p. 552 (Scotch).

² *Bond v. B.* (1754), 2 Lee, 45; *Goodman v. G.*, *ubi sup.*

³ The *Breadalbane* case, *Campbell v. C.* (1867), L. R., 1 Scotch and Divorce App., 182.

⁴ *Leeson v. Fitzmaurice* (1732), 1 Lee, 27, 28.

⁵ See evidence of this discussed in the *Dysart Peerage* case, *ubi sup.*; and see *Woodgate v. Potts* (1877), 2 Car. & K., 457; *Bond v. B.* (1754), 2 Lee, 45.

⁶ *Lyle v. Ellwood* (1874), L. R., 19 Eq., 98; *Goodman v. G.* (1859), 5 Jur., N. S., 902.

The effect of this presumption, that where an act has been done in fact, and intended to be valid, and this is proved, the law dispenses with the proof of such circumstances and preliminaries as are strictly necessary to validity, which ought to be and usually are done. It has been laid down lately by the House of Lords, explaining this old principle, that "where a marriage is proved to have been solemnised a long while ago by people who intended that it should be a good marriage, and it is done *bonâ fide* and openly, the maxim *omnia rite esse acta presumuntur* applies.¹ So in an earlier case the House of Lords had decided where two persons had shown a distinct intention to marry, and a marriage has been, in form, celebrated between them by a regularly ordained clergyman in a private house, as if by special licence, and the parties by their acts at the time showed that they believed such marriage to be a real and valid marriage, the rule of presumption was applied in favour of its validity, though no licence could be found, nor any entry of the granting of it, or of the marriage itself could be discovered; and though the bishop of the diocese (during whose episcopacy the matter occurred) when examined many years afterwards on the subject deposed to his belief that he had never granted any licence for such marriage.²

And thus presumption is constantly relied on even in bigamy cases (see *ante*, p. 125) to supply proof of the preliminaries of a marriage, *e.g.*, banns or licence, the licensing or registration of the church or building in which the marriage took place, the letters of ordination of the clergyman.

¹ The *Lauderdale Peerage* (1855), 10 App. Ca., 692; and see per Sir John Nicholl in *Sullivan v. Oldacre* (1819), 3 Phillim., 45, p. 54.

² *Piers v. P.* (1849) 2 H. L. C., 331; *Sichel v. Lambert* (1864), 15 C. B., N. S., 781.

Even if the marriage is secret and clandestine, still it is entitled to the benefit of the presumption.¹ The presumption may be rebutted, but it must be by very strong evidence.² If, however, an actual "wilful knowing" undue publication of banns by one party is proved, the prosecutor is then bound to prove that the other party was ignorant of such misdescription.³

(d) *Presumption of Death of former absent Spouse.*

If the first spouse is proved to have been alive at the date of the second marriage, the marriage is undoubtedly void, however long the first spouse may have been away, however innocently and *bonâ fide* the spouse remarrying may have acted, see *ante*, Chap. II, p. 33; as to criminal liability for bigamy, see *post*, Chap. XV, s. 3. The thesis here discussed is, that the one spouse, "Julius," has disappeared, and his wife, "Agnes," has remarried, and that Julius being the absent spouse, party to the first marriage, has never been heard of as alive at the date of Agnes' second marriage to Claudius. And different considerations apply according to the length of time between the date when such second marriage takes place and the disappearance of the absent "Julius."

Firstly, if a person has been absent without having been heard of for seven years, a presumption of fact arises that he is dead; but there is no presumption as to the time of his death.⁴ Therefore the marriage to

¹ *Steadman v. Powell* (1822), 1 Add., 58, p. 65.

² Per Lord Campbell in *Piers v. P.*, *ubi sup.*

³ *R. v. Kay* (1887), 16 Cox C. C., 292; and see *ante*, pp. 40, 126.

⁴ Doe on the demise of *Nepean v. Doe dem Knight* (1837), 2 M. & W., 894, Ex. Ch. The presumption probably arose from the statutes which exempted from bigamy, in case the party to the first marriage had been absent for seven years, and had not been known to the prisoner to have been alive within that time; see 1 Jac. I, c. 11; 9 Geo. IV, c. 31, s. 22;

Claudius, which has taken place seven years after the disappearance of Julius, seven years since he was last heard of, is presumed good and valid unless the person impugning it can discharge the burden of proof by showing the first spouse is alive at the date of the second marriage. If "Agnes" has not remarried, and Julius has not been heard of for twelve years, she will be presumed a widow, and Agnes must proceed under a plea of present coverture that Julius was alive within seven years.¹

But in favour of innocence, and in favour of the prisoner who sets up as a defence that a marriage in 1879 with Charlotte Georgina Lavers was invalid, such marriage will not be presumed valid when it is only proved that his previous wife, Ellen Earle, whom he married in 1864, was alive in 1869. This is the result of two conflicting presumptions, the presumption of life and presumption of innocence. If the case had been reversed, and the prisoner had been prosecuted for marrying Charlotte Georgina Lavers during the life of his first wife, Ellen Earle, Ellen Earle would then in favour of the prisoner have been presumed dead. But as it was, the Court held it should have been held an open question for the jury whether Ellen Earle was alive in 1879.²

Secondly, If the second marriage to Claudius takes place within seven years after the disappearance of Julius. As to this the law does not raise any presumption, that because after seven years a man is presumed dead, that, therefore, if Julius has been seen or heard at some period within seven years previous to the marriage to Claudius, a presumption arises that he is still living at the date of

24 & 25 Vict., c. 100, s. 57; and see *R. v. Tolson* (1889), 23 Q. B. D., 168; and see Best on Presumptions, pp. 190-192.

¹ *Hopewell v. De Pinna* (1809), 2 Comp. N. P., 113.

² *R. v. Willshire* (1881), 6 Q. B. D., 366; and see this case *ante*, p. 126.

the marriage to Claudius. His life or death is a question of fact for the jury, the law makes no presumption either way. If, for example, it were proved that the first spouse were alive in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that it was so.¹

So where the first spouse had enlisted as a soldier, and going abroad was never heard of again, and the wife married a year after his departure, the second marriage was held good;² but where a letter had been received from the first spouse, Julius, from Tasmania, dated only twenty-five days before the second marriage to Claudius, the second marriage was held invalid.³

As to the defence in bigamy of absence for seven years, see *post*, Chap. XV, s. 3.

SEC. 5.—LEGITIMACY AND ADULTERINE BASTARDY

(a) *Generally*

Every child born of the wife after lawful wedlock is presumed begotten of lawful intercourse, and therefore legitimate.⁴

Children born before marriage are by our law bastards, though by the Canon and Civil Law they become legitimate after the marriage of the parents.⁵

¹ *R. v. Lumley* (1869), L. R., 1 C. C., 196.

² *R. v. Twynning* (1819), 2 B. & Ald., 386; and see *Lapsley v. Grier-son* (1848), 1 H. L. C., 498.

³ *R. v. Harborne* (1835), 2 A. & E., 540.

⁴ See authorities cited, *post* (b), p. 148 and seq.; for French Law, see Code Civil, tit. 17, ss. 312-330. The reason given by the Canonists is, "quicumque semen apposuit, marito acquiritur quia est dominus ventris," Bac. Abr., vol. i., p. 749; and see Mascardus de Probationibus, vol. ii., ss. 787-806.

⁵ Statute of Merton, 20 Hen. III, c. 9; and see Coke upon Littleton, 245a; Coke's Institutes, vol. i., p. 97; and see *Birtwhistle v. Vardill*

When the exact date of the birth of the wife's child is uncertain, it is presumed to have been born after marriage.¹

But if husband and wife have been divorced *a mensa et thoro*, or judicially separated, or authorised to live apart by a police magistrate, from that moment all the presumption which exists in the case of married persons as to access and legitimacy of children is reversed; and her children begotten on her during the separation are not presumed legitimate, for it is deemed that husband and wife will obey the sentence of divorce.² And in a recent case where Lord Aylesford petitioned for divorce owing to Lady Aylesford's adultery with Lord Blandford, which was proved, but no decree was made owing to the petitioner, Lord Aylesford, being also found guilty of adultery, and Lady Aylesford continued cohabiting with Lord Blandford, there was no presumption of legitimacy as to a child born of her.³

The issue born of a null and void marriage (as to what these are, see *post*, Chaps. V, VI) are illegitimate;⁴ but by Canon, Civil, and Scotch Law,⁵ and also by the Code Napoleon,⁶ the issue of such marriage, if one of the parents entered into such marriage *bonâ fide*, are held legitimate. However, under the provisions of the Divorce Act, the Court can, after declaring such reputed marriage void,

(1840), 7 Cl. & F., 895; for French Law, see Code Civil Act, 331-342; and see *post*, Chap. XVIII.

¹ *Lady Mayo v. Brown* (1757), 2 Lee, 391.

² *St. George's v. St. Margaret's* (1707), 1 Salk., 123; *Hetherington v. H.* (1887), 12 P. D., 112.

³ The *Aylesford Peerage* case (1885), 11 App. Ca., 1.

⁴ See Rolle & Viner's Abridgment, tit. Bastard; originally the English Law was in accordance with the Canon Law, see Rolle's Series, Y. B., 11 & 12 Ed. III, Preface, pp. 20-23.

⁵ Fraser on Parent and Child, 2nd ed., chap. i., pp. 22 and seq.; Sanchez, bk. iii., disp. 42, 43; and see *post*, Chap. XVIII, s. 5 (a).

⁶ Articles 201, 202 of Code Civil.

order maintenance for the children of it thereby bastardised.¹

This presumption of legitimacy depends on the presumption of sexual intercourse between husband and wife, and as such it may be rebutted on proof of non-access. After proof of sexual intercourse, evidence will not be admitted except to disprove that fact. Once sexual intercourse is established between husband and wife at the time of the child being conceived, no question further can be raised as to illegitimacy; for even if the wife is shown to have had sexual intercourse with other men, the law will not allow a balance of evidence as to who is the father.²

(b) *Proof of Non-Access*³

From the earliest dates the presumption of legitimacy could be rebutted, and special bastardy proved by showing that the husband was impotent, or under fourteen years of age.⁴

The old rule of law was that if the husband was within the four seas, the wife's child was conclusively legitimate, and could not by any means be bastardised;⁵ but in the eighteenth century this rule was regarded as exploded.⁶

¹ *Langworthy v. L.* (1886), 11 P. D., 85, C. A.

² Answers of the judges in the third and fourth questions in the *Banbury Peerage* case (1811), 1 Sim & St., 153; *Cope v. C.* (1833), 1 M. & Robb, 269; and per Lord Cottenham, L. C., in *Morris v. Davies* (1837), 5 Cl. & F., 163; and see *Wright v. Holdgate* (1850), 3 C. & K., 158.

³ "Non-access" between husband and wife is used as equivalent for the "non-existence of sexual intercourse," see the last paragraph of the judge's answers in the *Banbury Peerage* case; and see per Lord Cottenham, L. C., in *Morris v. Davies* (1837), 5 Cl. & F., 163, p. 247, explaining "access." It is not used in the sense of husband and wife being in the same place or house.

⁴ Viner's Abridgment, tit. Bastard, A 2 & B.

⁵ See Rolle & Viner's Abridgment, tit. Bastard; *R. v. Knightley* (1695), Sett. Cas. 1, Holt, 93.

⁶ See *R. v. Bedell* (1737), Andr., 9.

The law of adulterine bastardy has during the present century been very thoroughly discussed in the *Banbury Peerage* case.

The Earl of Banbury having married in 1605, aged fifty-eight, Lady Elizabeth Howard, aged nineteen, she gave birth to two sons in 1627 and 1631 respectively, the Earl, her husband, being aged eighty and eighty-four respectively. The legitimacy of these sons was continually disputed, but was not finally decided till 1813, when, on a claim by General Knollys, the House of Lords, after hearing the answers by the judges to questions of law put by the House, finally decided against the legitimacy of this issue, and disallowed the claim.¹ The law was again discussed in the House of Lords in 1837 in the important appeal *Morris v. Davies*,² when the answers of the judges in the *Banbury Peerage* case were discussed and approved, and the burden, admissibility, and weight of evidence necessary to establish non-access and illegitimacy explained at great length.

The answers of the judges in the *Banbury Peerage* case are epitomised by Lord Cottenham, L. C., in *Morris v. Davies* as follows :—

“First, that when husband and wife have opportunities of access, the presumption of legitimacy may be rebutted by circumstances inducing a contrary presumption. Secondly, that non-access or non-generating access may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact. Thirdly, that after proof of sexual intercourse, evidence will not be admitted except to disprove the fact. Fourthly, that sexual intercourse is presumed, unless met by such evidence as satisfies those who are to decide that it did not take place. Then in terms

¹ See a long history of the case in Nicholas on Adulterine Bastardy. There is a monument to a so-called Earl of Banbury in Winchester Cathedral; see Dict. Nat. Biog., vol. xxxi., Knollys' William Earl of Banbury, pp. 286-289.

² See 5 Cl. & F., 163.

they state, that by access they mean sexual intercourse and not such intercourse as is understood by being in the same place or house.”¹

And in *Morris v. Davies*,¹ the Lord Chancellor, Lord Cottenham, further decided that there is no rule of *intra quatuor muros* to the effect that if husband and wife have opportunity of intercourse by being in the same town, house, or room, no evidence is admissible to disprove sexual intercourse.

“Some facts are so strong as to offer irresistible evidence of sexual intercourse having taken place, as the husband and wife sleeping together, there being no natural impediment to sexual intercourse; but in the absence of such irresistible evidence, the fact of sexual intercourse must be tried like every other fact to which no direct evidence is applicable. Proof that husband and wife were living in the same town, and so had opportunities of meeting, and therefore of sexual intercourse, would in the absence of any proof raising a presumption to the contrary, be sufficient to establish the legitimacy of a child born of the wife. Proof that they had been in the same room or in the same house together would be much stronger evidence of the fact; the strength of which, however, would vary with the circumstances; and as neither would be direct proof of sexual intercourse, but of facts from which sexual intercourse would be inferred, such inference must, as in all other cases, be capable of being repelled by the proof of facts tending to raise a contrary presumption.” “The parties may be followed within these four walls, and the fact of sexual intercourse not only disproved by direct testimony, but by circumstantial evidence raising a strong presumption against the fact.”

Nor is such circumstantial evidence to be confined to the particular period of the imputed act (the question being whether husband or wife had on the occasion sexual intercourse), and the subsequent acts and conduct of the parties are to be looked at and considered for the purpose of establishing or repelling the presumption of sexual intercourse. And among such evidence of conduct would be that the wife was living in adultery, that the birth of the child was concealed from the husband, that the husband disclaimed all knowledge of or respon-

¹ (1837) 5 Cl. & F., 163.

sibility for the child, and that the wife's paramour treated it as his own and paid for it.¹

But in three subsequent cases, Lord Langdale, M. R., Kindersley, V. C., and Butt, J., have emphatically laid down that the presumption in favour of legitimacy is a strong one, and can only be rebutted by evidence clear and conclusive, and not merely resting on a balance of probabilities, and till this evidence is "in," there is no onus on the person whose legitimacy is in question to show opportunities of access.²

So where a husband was confined in a lunatic asylum, and his wife visited him, the attendants having strict orders not to leave them alone, but she deposed that while visiting they eluded the vigilance of the attendants and got out of the grounds, and went to the house of a friend and intercourse followed, and the lunatic and his mother recognised the child subsequently born of the wife, the Court held such child legitimate, notwithstanding the wife had been accused of adultery with a farm labourer.³

Adulterous cohabitation by the wife will not justify a conclusion of illegitimacy against the child unless there is proof of non-access by the husband.⁴

Parent's Evidence inadmissible to bastardise Issue.—It remains to mention a very important rule of evidence on the proof of non-access, viz., neither husband nor wife can be called as witnesses to prove or disprove sexual intercourse, or to give any testimony tending to bastardise or affect the legitimacy of their putative issue.⁵

¹ And see, too, the *Aylesford Peerage* (1885), 11 App. Ca., 1.

² *Hargrave v. H.* (1846), 9 Beav., 552; *Plowes v. Bossey* (1862), 31 L. J. Ch., p. 681; *Bosville v. The Attorney-General* (1887), 12 P. D., 177.

³ *Plowes v. Bossey*, *ubi sup.*

⁴ *R. v. Mansfield* (1841), 1 G. & D., 7.

⁵ See Taylor on Evidence, vol. i., 8th ed., p. 817; and see Code Civil, articles 312, 313.

But statements and declarations by either parent may be given in evidence proving conduct leading to the conclusion that the child is illegitimate, as a letter by the wife (though still alive and not called or admissible as a witness) to her paramour,¹ or a statement by the bastard's father in the baptismal register that the child was his.²

(c) *Posthumous Birth and Birth long after Intercourse*

Writ de ventre inspiciendo.—"For the benefit and safety of right heirs against supposititious children, the law hath provided *remedie* by the writ *de ventre inspiciendo*."³ The writ lies in case of a man owning land and marrying, and then dying without an heir of his body, and so that his land should descend to his brother or more remote heir, in that case the brother or heir can have the writ *de ventre inspiciendo*.

The writ is available, not merely to the heir, but also to a tenant in tail, or devisee; but not to an heir-apparent. Except in case the widow remarries after the death of the first husband, the writ cannot usually be sued out in the life of the husband, but then the heir, etc., of the first husband can sue out the writ.

But in one case where land was devised by H. A. Fellows to the issue of Martha Brown and in default to the petitioner, Newton Wallop, and Martha Brown's

¹ *Aylesford Peerage* case (1885), 11 App. Ca., 1; and see *Burnaby v. Baillie* (1889) 42 Ch. D., 282; and *re Walker* (1885), 53 Law Times, 660.

² *Re Turner* (1885), 29 Ch. D., 985.

³ Coke upon Littleton, 8b, where a long account of the writ is given, and 123b; and see *Willoughby's* case (1597), Cro. Eliz., 566; and also Rolle's Abridgment, 356, where a case, *John de Radewall*, was referred to as tried in the Lord's Court in which the widow stripped herself to her shift and so allowed herself to be inspected in open Court.

husband was an officer on service in the East Indies, where he had been for ten years, and Martha Brown, the wife, had remained apart in England, but being a person of ill fame, had from time to time pretended herself to be pregnant, the Lords Commissioners of the Great Seal gave a writ *de ventre inspiciendo* to Newton Wallop, the devisee, although Ulysses Brown, the husband, was alive.¹

The writ is of common right; the procedure is that the first writ issues to see whether the widow be with child, and *quando paritura*, and if the jury² find, and the Sheriff return, that she is with child, then the widow³ is removed by a second writ issuing out of the Common Bench to a castle where the Sheriff is to keep her safely.⁴ But no pregnant woman, not even her own mother, must be with the widow, though such pregnant mother may be allowed to visit her.⁵ The writ must always be applied for by petition.⁶

The last time this writ is reported to have been sued out is in 1847, when it was granted by Knight Bruce, V. C.;⁷ and apparently it is still available.

From the above cases it will be noticed that by English Law a widow may remarry as soon as she pleases after her husband's death, and such also is the Scotch Law; yet by

¹ *Re Brown, ex parte Wallop* (1792), 4 Bro. C. C., 90.

² The jury is to be composed of men and women, but the search was to be made by the latter only, Co. Lit., 123*b*, n. (1); as to proceedings by a jury of matrons in a criminal case where the prisoner says she is pregnant, see *R. v. Wycherley* (1838), 8 C. & P., 262.

³ If the woman has remarried she may be left in her second husband's custody, he giving security not to remove her from a house, and to let her be inspected by women sent by the Sheriff; *Thraaker's* case (1625), Cro. Jac., 686.

⁴ *Ex parte Aiscough* (1731), 2 P. Wm., 591.

⁵ *Aiscough v. Chaplin* (1730), Cooke, 93.

⁶ *Ex parte Bellett* (1786), 1 Cox, 297.

⁷ *In re Blakemore* (1845), 14 L. J. Ch., 336.

the Civil Law she has the *annus luctus*, and by the Code Napoleon¹ ten months during which she must remain single;² but by Canon Law a woman is free to marry at once.³

If the widow, having remarried, has a child less than nine months after her husband's death, according to some authorities it is the child of the first husband; according to others, the circumstances of the case should determine who is the father; but others, again, say that the child, when arrived at years of discretion, may choose his father.⁴ As regards the second husband, it is suggested that if the child is held to be at law the issue of the first husband, it *ipso facto* cannot be the child of the second husband, otherwise the child might have two legal fathers; this thesis is also discussed later, see *post*, p. 161.

Ultimum tempus.—The thesis here discussed is, admitting that sexual intercourse has taken place, yet such having ceased by death or absence, how long a period of gestation will be allowed by the law so that a child born thereafter may be considered legitimate.

The law has not fixed any *ultimum tempus*, though, by common practice, forty weeks is regarded as an extreme time;⁵ but in each case medical evidence is taken, and it

¹ Articles 228 and 296.

² 1 Blackstone's Commentaries, 457; in *Theaker's case* (1625), Cro. Jac., 686, the widow remarried a week after the first husband's death.

³ Sanchez, de Matrimonio, bk. vii., disp. 87, Nos. 21-33; but in view of this contingency the Canonist refers in the same disputation to the practice of testators forbidding their widows to marry during the *annus luctus* on pain of forfeiting the benefits under the will, such prohibition being, it appears, canonically valid.

⁴ Cok. Lit., 8a, 123b; Rolle's Abridgment, tit. Bastard, 357; *Theaker's case*, *ubi sup*.

⁵ For old cases as to time, see *Alsop v. Bowtrell* (1620), Cro. Jac.,

is considered whether the child is full-grown. In a recent case where a child was born two hundred and seventy-six or two hundred and seventy-seven days after a wife eloped from her husband, and at the time of her elopement she was under menstruation, and she ever since cohabited with an adulterer, the jury found the child a bastard, and the Divisional Court upheld the verdict;¹ and in another case where a period of two hundred and seventy-nine days had elapsed since intercourse, a Chancery judge decided on this and other grounds that the child was illegitimate.²

(d) *Birth soon after Marriage*

By the old law, "If a man marries a woman grossly big by another, and within three days after she is delivered, in our law the issue is a mulier (legitimate), and by the Spiritual Law a bastard."³ Only two reported English cases exist⁴ in which this question has,

541; and Viner's Abridgment, tit. Bastard, A; and see Taylor's Medical Jurisprudence, tit. Gestation; Coke upon Littleton, 8a, 123b. The French Law fixes three hundred days, Code Civil, article 315.

¹ *Bosville v. The Attorney-General* (1887), 12 P. D., 177; and see *Pryor v. P.* (1887), 12 P. D., 165.

² *Burnaby v. Baillie* (1889), 42 Ch. D., 282.

³ Viner's Abridgment, tit. Bastard (B) & (E), citing the Year Books; Coke upon Littleton, 244a; and see Rolle's Abridgment, tit. Bastard (E). In Bacon's Abridgment, tit. Bastardy, p. 752, the reason given is, "If a woman marry *grossment enseint* it is the child of the husband; for when they testify their consent by a public marriage before the birth of the child, it is a public acknowledgment that the child is his; for at that time the child is one with the mother, and, therefore, in taking the mother, he takes the child with her;" and see Best on Presumption, p. 70, where stress is laid on the fact that the mother is *visibly* pregnant at date of the marriage. For French Law, see Code Civil, article 314.

⁴ *Anon v. Anon* (1856), 22 Beav., 481; 23 *ib.*, 273; *Parsons' Trusts* (1868), 18 L. T., 704; for antenuptial pregnancy considered as adultery, see *Kennedy v. K.* (1890), 62 L. P., 705, discussed, Chap. VII, s. 5 (b).

subsequent to the above cited authorities, been discussed, in one of which the child was born three months and in the other three weeks after marriage. In the former case¹ Sir J. Romilly, M. R., laid down, "Though I do not entirely adopt to its full extent the proposition that a husband admits by his marriage that the child subsequently born is his, yet I think the presumption is that he does so admit it if he takes no step to repudiate it, but adopts toward it exactly the same course as if it were his own child, making no complaint of the premature birth of the child, or of his having married a woman not fit to be his wife." The Master of the Rolls further ruled that the privilege which enables a husband or wife to decline answering questions to access or non-access in case of disputed legitimacy² applies to a case where a child is born three months after marriage. And the judge further said, "I will allow you if you cross-examine her to ask her this question, 'When did you first know this gentleman?' For as at present advised I should say that you are entitled to know when she first knew him. Further than that I cannot allow you to go." In the latter case,³ Stuart, V. C., recognised, as a rule, that in such a case there is a legal presumption, but a rebuttable presumption in favour of legitimacy.

In a previous case⁴ there is an *obiter dictum* of Lord Ellenborough, C. J., "With respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground. The marriage of the parties is the criterion adopted by the law, in cases of antenuptial generation, for ascertaining parentage of the

¹ *Anon v. Anon*, *ubi sup.*

² See *ante*, p. 151.

³ *Parsons' Trusts*, *ubi sup.*

⁴ *R. v. Luffe* (1807), 8 East, 193, p. 207.

child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage."

In a Scotch case¹ before the House of Lords, where the child was born seven weeks after marriage, and the husband knew of the antenuptial pregnancy, Lord Blackburn said, "I do not think the presumption of parentage is nearly so strong in such a case as it would be, or ought to be, if the time when the child was begotten was after the parties were married, and were husband and wife." And in that case both the Lord Chancellor, Lord Cairns, and Lord Blackburn adopted the judgment of Lord Gifford, the Scotch Lord of Session.

"Where, as in the present case, a man marries a woman who, at the time of marriage, is in a state of pregnancy, the presumption of paternity from that mere fact is very strong, and is, perhaps in most cases, in entire accordance with the truth. Still, further, where the pregnancy is far advanced, obvious to the eye, or actually confessed or announced, as in the present case, to the intended husband, a presumption is reared up which, according to universal feeling, and giving due weight to what may be called the ordinary instincts of humanity, it will be very difficult indeed to overcome . . . wherever an avowed and open courtship has taken place, and there have been opportunities of access, and thereafter the man marries the woman in an advanced state of pregnancy, knowing that she is so, and hurrying on the marriage, as it happened here, for that very reason, I do not say the presumption of legitimacy is absolutely conclusive, but I do say it is almost as strong as such a presumption can be."

And, further, in this case the Lord Chancellor spoke of "the much stricter presumption which, in the case of English Law, would be drawn from these circumstances." And in this case, notwithstanding the evidence of husband and wife to the effect that the child was not the husband's, the law held it legitimate and by the husband.

¹ *Gardner v. Gardner* (1877) 2 App. Ca., 723; and see *Reid v. Mill* Feb. 8, 1879), 6 Court of Session Cases, *Rettie*, 4th series, 659.

A husband's and mother's declarations that a child born in wedlock is not his, are not sufficient to prove it illegitimate, though it was born only three months after marriage.¹

In this state of the authorities the law seems doubtful and unsatisfactory.

However, it appears certain law that the old rule, if it ever existed, that the legitimacy of such a child so born was conclusive and indisputable, is as obsolete as the *quatuor maria* doctrine, see *ante*, p. 148. At most there is a presumption of legitimacy, and probably a presumption that is weaker, as Lord Blackburn observed (see *ante*, p. 157), than in case the child was conceived after marriage. And Lawrence, J.,² considered it only a presumption, and says the reason of it depends on the man *knowing* the woman to be pregnant, for then by marrying her he may be considered as acknowledging, by a most solemn act, that the child is his; and in the same case Le Blanc, J., spoke of marriage "*recently* before the birth of the child," and therefore as of manifest pregnancy. And some at least of the earlier authorities (see *ante*, p. 155) refer to a state of circumstances where either the husband had express knowledge of the pregnancy, or else it was so far advanced, *grossment enseint*,³ that the husband must be taken to have known of the pregnancy.

And this, it may be suggested, is the most satisfactory ground for the presumption that such a child is legitimate, viz., as depending on recognition by the father arising from his knowing the woman he marries to be pregnant,

¹ *Gardner v. G.* (1877), 2 App. Ca., 723; and see same point, *Bowles v. Bingham* (1812, *circa*), 2 Mun. Vir., 442, 3 *ib.*, 599; as to inadmissibility of parents' evidence to bastardise, see *ante*, p. 151.

² In *R. v. Luffe* (1807), 8 East, 193, p. 210.

³ Rolle's Abridgment, tit. Bastard, pp. 358, 359; Bacon's Abridgment, tit. Bastard, 7th ed., p. 752.

and especially if this recognition is strengthened by his subsequent treating the child as his. For it would not be satisfactory to base it on the presumption of antenuptial intercourse, which between husband and wife is rightly presumed; but why should the law presume antenuptial intercourse between the woman and her future husband rather than with any other person, when such intercourse is in any case illicit, and in some cases may be adulterous.

If, as the author suggests, this is the reason of the rule of law, then in cases where the husband has, at the date of the marriage, no knowledge, express or implied, of the wife's pregnancy, as if, *e.g.*, there are several months to run so that the pregnancy is not manifest, and there is no subsequent recognition as in case the husband dies before the child was born, in such case there will be, it is suggested, no presumption of legitimacy, and the filiation must be proved, and the case will be *a fortiori* where the husband is not only ignorant of the wife's pregnancy at the date of the marriage, but further, as soon as he perceives the pregnancy, and at and after the birth of the child, repudiates the paternity. In this uncertain state of the law it is material to examine the American and Canon Law.

American Law.—In a United States Circuit Court,¹ Chief Justice Marshall laid down—

“If one marries a woman in such an advanced state of pregnancy that he must have known her situation, it must be considered as a recognition of the child afterwards born as his own; and any conduct of his after the birth indicating a belief that the child is his is decisive. But if, at the time of marriage, the pregnancy is probably unknown, where the parties' acquaintance commenced too late for the husband to be the father of the child afterwards born, where the common opinion

¹ *Stigall* or *Stegall* v. *S.* (1820, *circa*), 2 Brock., 256; and see *Dennison* v. *Page* (1857), 29 Penn., 5 Carey, 420.

assigns the child to another man, when the child grows up not in the husband's house, nor looking upon him as a father, nor being considered as his child, and where the woman's reputation is not good,—the presumption of legitimacy is strongly repelled.”

Mr. Justice Lumpkin laid down ¹—

“While the law presumes every child legitimate which is born within wedlock, still in a question of this sort there is and should be a difference between post and antenuptial conceptions. In the later much slighter proof should be required to repel the presumption of legitimacy arising from marriage. For here it is the marriage only, and not the presumed sexual intercourse resulting from marriage, which creates the presumption. Every child begotten and born within wedlock is rightly presumed to be the offspring of the husband. But such presumption does not necessarily arise where the child is begotten *before* marriage. Another man may as likely be the father as the future husband, as no one is entitled to sexual intercourse.”

And this was cited with approval in a later Californian case,² where the wife produced a fully-developed child four months and nineteen days after marriage, the husband being ignorant of the pregnancy even until the birth of the child, and then immediately repudiated the paternity and returned the wife to her relations, and she confessed her guilt. Here the Court laid down that

“The marriage is an acknowledgment by the husband that the child is his; but to be effective there must be knowledge at the time of the fact admitted. Hence when a man marries a woman with child, the law presumes the child is his; but the presumption is based upon the fact that he knew at the time of his marriage the situation of the woman.”

In this case the Court granted a divorce.

Later American cases³ have given more weight to

¹ *Wright, Administrator of, v. Hicks* (1852, circa), 15 Geo., 160.

² *Baker v. B.* (1859), 13 Cal., Harman, 87.

³ *Phillips v. Allen* (1861), 84 Mass., 2 Allen, 453; *Kleinert v. Ehlers* (1861), 38 Penn., 2 Wright, 439, where it is laid down that when the future husband and wife might have had antenuptial sexual intercourse it will be presumed they did have; *Tioga County v. South Creek Township* (1874), 75; *ib.*, 25 Smith, 433; *Bailey v. Boyd* (1877), 59 Ind., 6

the strong presumption in favour of legitimacy; but the Courts have laid down that though a man marrying a woman, knowing her to be pregnant, cannot charge another man in bastardy proceedings, as he conclusively adopts the paternity, yet this does not apply in cases of heirship.¹

Canon Law.—The rule of the Canon Law is that children born seven months and more after marriage are presumptively reckoned the husband's children; but if born less than seven months after marriage filiation must be proved.² As to children born less than seven months after marriage, the Canon Law legitimises them on the same principle as it legitimises *per subsequens matrimonium* children born previous to marriage, *i.e.*, filiation must be proved. And previous to allowing proof of filiation, the Canon Law requires they should be the result of intercourse between unmarried persons *ex solutâ cum soluto* conceived at a time when the parents might have lawfully intermarried.³ If the English Law does not insist on this, it would admit the possibility of a child having two legal fathers; see *ante*, p. 154.

Further, assuming the generation is *ex soluta cum soluto*, filiation must next be proved; and the evidence of filiation the Canon Law most regards is recognition by the father. If this is once done it can only be overthrown

Martin, 292, on a local Act; *State v. Romaine* (1882), 58 Iowa, 46; in all these American cases English authorities were cited. And see Bishop on Marriage and Divorce, vol. i., ss. 187, 548.

¹ *State v. Shoemaker* (1883), 49 Amer. Rep., 146; *Miller v. Anderson* (1885), 54 Amer. Rep., 823.

² Rota Romana, Recent Decisions collected by J. B. Compagno, vol. xix., pt. i., p. 83; Decision 75, on May 22, 1677; *ib.*, More Recent Decisions, collected by Cardinal Luca, bk. x., Decision 23, No. 6.

³ Rota Romana, Recent Decisions collected by Paul Rubæus, vol. ix., pt. i., p. 224, Decision 105, n. 13, June 23, 1642.

by very strong conclusive evidence, and it is not necessary to prove that no one but the future husband could have had access to her.¹

¹ See Rota Romana, More Recent Decisions collected by Cardinal Luca, vol. ii., bk. x., Decision 23, No. 3; bk. xiv., Decision 6, vol. iv., p. 170, Monday, Jan. 14, 1704.

CHAPTER IV

RIGHTS AND DUTIES OF HUSBAND AND WIFE

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SEC. 1.—PERSONAL RIGHTS

(a) *Cohabitation and Unity*

By marriage husband and wife become in law, for many purposes, one person.¹

So husband and wife could not in Common Law be guilty of stealing one another's goods,² and therefore the

¹ Blackstone's Commentaries, vol. i., chap. xv., 444; Stephen's Commentaries, bk. iii., chap. ii.; and see *in re Jupp* (1888), 39 Ch. D., 148; and *in re Dixon* (1889), 42 Ch. D., 306.

² Hawkins' Pleas of the Crown, bk. i., chap. xxxiii., sec. 32; Hale's Pleas of the Crown, vol. i., pp. 513, 544.

adulterer receiving from her the goods which she had taken from her husband, could not be guilty of receiving them ;¹ but now by the Married Women's Property Act, 1882, 45 & 46 Vict., c. 75, criminal proceedings may be taken as between husband and wife when either party leaves or deserts, or is about to leave or desert the other.²

Originally, therefore, at Common Law husband and wife could not make gifts to one another ; but in equity a married woman, not restrained from anticipation (as to which see *post*, 193, 196), could transfer her separate property to her husband ; and a husband could by a gift to a wife make it her separate property and be a trustee for her,³ although such gifts would be subject to the claim of his creditors. This equitable right is confirmed and enlarged by the Married Women's Property Act, 1882.

Further, husband and wife could not sue one another ; but in equity the wife could sue and be sued with regard to her separate property ; and this is now confirmed by the Married Women's Property Act, 1882, ss. 11 and 12, except as regards torts, for which (see s. 12 of the Act) neither husband nor wife can sue one another for acts done while cohabiting. Therefore even if the wife subsequently obtains a divorce, she cannot sue the husband civilly in damages for an assault during cohabitation.⁴

So now husband and wife can contract one with another, but marriage renders void antenuptial contract.⁵

So husband and wife could not give evidence in civil or criminal proceedings for or against each other ; but this

¹ *R. v. Kenny* (1877), 2 Q. B. D., 307.

² SS. 12 and 16 ; and see *post*, Chap. XV.

³ *Re Whittaker* (1882), 21 Ch. D., 657.

⁴ *Philips v. Barnett* (1876), 1 Q. B. D., 436 ; she may, however, in certain cases prosecute her husband criminally or ask for articles of the peace against him ; see Chap. XV, s. 5.

⁵ *Butler v. B.* (1885), 14 Q. B. D., 831.

rule now is altered by legislation, and applies only to criminal proceedings.¹ But in crimes between husband and wife either can *ex neresitate rei* give evidence against the prisoner ; see *post*, Chap. XV, s. 5.

Further, when the wife acts with her husband in crime she is, except in cases of treason, murder, brothel-keeping, or certain misdemeanours, protected from prosecution by its being *presumed* that she acted under the coercion of her husband ; but this presumption may be rebutted.²

The wife takes her husband's rank ;³ but if a duchess or other peeress by marriage remarries a gentleman or esquire, she *loses* her previous name and dignity, as in the case of Lady Powes, who married R. Howard, and the Duchess of Suffolk, who married Adrian Stokes, the writs abated in their cases ; but a woman, noble by birth or descent, whosoever she married, remains noble.⁴ She also takes his domicile and nationality,⁵ and she is considered as constructively resident with him, whether she may actually be abiding or living apart.⁶ And the husband has the right to fix the domicile where he pleases, and the wife must follow him through the world.⁷

But where the wife has obtained a divorce *a mensa et*

¹ See Stephen's Commentaries, 8th ed., vol. ii., p. 260.

² Taylor on Evidence, 8th ed., p. 209 ; and see Roscoe's Criminal Evidence, 11th ed., pp. 955-957 ; Hale's Pleas of the Crown, vol. i., pp. 44-48, 513, 514 ; Hawkins' Pleas of the Crown, bk. i., chap. i., secs. 9-13.

³ *Duchess of Kingston's case* (1776), 20 State Trials, 355 ; *Countess of Rutland's case* (1606), 6 Coke's Reports, 52b.

⁴ Brooke's New Cases, 4 Mar., 1, 153, and tit. Nosme, 137 ; *Countess of Rutland's case*, *ubi sup.* ; *Harvard v. Duke of Suffolk* (1553), 1 Dy., 79b.

⁵ *Harvey v. Farnie* (1882), 8 App. Ca., 43 ; *Turner v. Thomson* (1888), 13 P. D., 37 ; *Bloxam v. Favre* (1884), 8 P. D., 101 ; 9 P. D., 130, C. A.

⁶ *Warrender v. W.* (1835), 2 Cl. & F., 488 ; *Whitcomb v. W.* (1840), 2 Curt., 351 ; *Yelverton v. Y.* (1859), 1 Sw. & Tr., 574.

⁷ Schouler's Domestic Relation, chap. ii.

thoro for the husband's adultery, the ordinary presumption that the wife is domiciled where the wife is fails.¹ And if the husband is banished the realm or imprisoned, the wife need not follow him, and in these cases she becomes a *feme sole*.²

Further, it seems an antenuptial contract to live in England is valid, and gives the Court jurisdiction;³ and if the place selected by the husband, as in the case cited, County Dublin, would be injurious to the wife's health, that may be an excuse.⁴ Still, Lord Westbury expressed a doubt whether the domicile of the husband is to be regarded as the domicile of the wife, either by construction or attraction, so as to compel the wife to become subject, for the purposes of divorce, to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile.⁵

The law enforces cohabitation and a common residence. If either party desert the other, there arises a right to enforce renewed cohabitation by action for restitution of conjugal rights; *complaining*, that the other party has withdrawn from cohabitation without lawful cause. The lawful cause of withdrawal is adultery or cruelty, either of which may be pleaded in bar.⁶ Further, a separation deed will estop the petitioner; see *post*, Chap. X, s. 1 (*b*).

But besides the husband's remedy by suit for restitution, or in execution of such decree, it was generally

¹ *Williams v. Dormer* (1852), 2 Rob. Ec., 505.

² See note above, and refer Blackstone's Commentaries, bk. i., p. 443; *R. v. Pilkington* (1853), 2 E. & B., 546.

³ *Santo Teodoro v. S. T.* (1876), 5 P. D., 79; and see *post*, Chap. VII, s. 1 (*c*).

⁴ *Molony v. M.* (1824), 2 Add., 249.

⁵ *Pitt v. P.* (1864), 4 Macqueen, 627, p. 640.

⁶ *Corpus Juris Canonici Decretum*, bk. iv., tit. 19, cap. 4; Oughton, tit. 215; *Hope v. H.* (1858), 1 Sw. & Tr., 94; and see *post*, Chap. X, s. 1, as to the action for restitution.

believed among lawyers, previous to 1891, that a husband had a right to seize his wife if he could catch her out of doors, and confine her to the house while contumacious ; but in that year the Court of Appeal, consisting of Lord Halsbury, L. C., Lord Esher, M. R., and Fry, L. J., decided, that when a wife refuses to live with her husband, he is not entitled to keep her in confinement, or to seize her in order to enforce restitution of conjugal rights.¹

Neither has a wife any right to imprison a husband by locking him up in his own house, even if she suspects he is going to visit a mistress.²

As to "Desertion," see *post*, Chap. VII, s. 5 (d).

(b) *Marital Intercourse.*

It is a maxim of the Civil as well as the Ecclesiastical Law, that *consensus non concubitus facit matrimonium* ; and so where parties intermarrying give their consent according to the law, perfect marriage is constituted, and consummation adds nothing to it.³

Therefore, if two parties marrying mutually consent and agree to abstain from intercourse, their marriage would be for all intents and purposes good, and they

¹ *R. v. Jackson* (1891), 1 Q. B., 671, C. A., thus overruling Lord Mansfield, C. J.'s dictum ; *R. v. Meul* (1758), 2 Ken., 279, the decision of Coleridge, J., *re Cochrane* (1840), 8 Dowl., 630, and of Wilde, B., *re Price* (1860), 2 F. & F., 263 ; the only authorities in favour of their decision are the dicta of Dr. Lushington in *Lockwood v. L.* (1839), 2 Curt., 281, p. 301 ; and see *post*, p. 173, n. 3. After this decision it would seem that the old action for harbouring a wife against a husband's will is obsolete ; for an instance of this action see *Lewis v. Ponsford* (1838), 8 C. & P., 687 ; see *post*, p. 183.

² *Waring. v. W.* (1813), 2 Phillim., 132, p. 142 ; and see pp. 190, 255.

³ Bishop on Marriage and Divorce, 6th ed., vol. i., s. 228 ; Swinburne on Spousals, sec. iv., s. 3, quoting the instance of the Virgin Mary, who, though not known by Joseph, was termed wife ; see Lord Stowell's judgment, *Lindo v. Belisario* (1793), 1 Hagg. Con., 216, p. 232 ; and see *Hall v. Wright* (1858), E. B. & E., 746.

would, in the eye of the law, be husband and wife, and entitled to all rights as such. If such mutual consent and agreement was entered into previous to the marriage, to the effect that the parties would not consummate the marriage, it seems to be law that it could not be enforced if one party subsequently, changing his or her mind, and wishing to consummate, was refused, and that he or she would not be debarred and estopped from enforcing his or her rights by an action for restitution of conjugal rights (see *post*, Chap. X, s. 1); or if still defrauded, he or she could sue for nullity of marriage (see *post*, Chap. V, s. 1 (*a*)); for an agreement for future separation is bad and void (see *post*, s. 5, p. 201). But if such mutual consent and agreement for abstinence was made after marriage, and still more after consummation, it might, if amounting to a present separation, be good.

So, in a case of "profession," Pierce Connelly, a clergyman of the Protestant Episcopal Church in the United States, agreed and consented verbally with his wife, to whom he had been married in Pennsylvania, that as they both became Roman Catholics, and he wished to become a Roman Catholic priest, that they should live in constant and perfect chastity, abstaining from sexual intercourse with one another; and then she became a nun and he a priest. She subsequently entered a religious house at Hastings, and he was chaplain to Lord Shrewsbury. Then he changed his mind and wished to see her, and to have intercourse with her; but she by the rules of her convent refused. He then sued for restitution of conjugal rights; and it was held, that by the law of England it was no defence, but the wife was allowed to state what was the law of Pennsylvania. No decree was made.¹

¹ *Connelly v. C.* (1850), 2 Robertson, 201. At that time separation deeds were deemed contrary to law and void, but now they are enforced;

So on marriage (refraining, perhaps, for the three days after the ceremony, see *ante*, p. 74, n. 3), it is the husband's right, nay, his duty (as to which see *post*, p. 170), to consummate the marriage. If the wife refuses to submit to consummation, the husband may, but is not legally bound to, resort to such brute force as, but for the marriage would be rape, to oblige his wife to submit to connection; for if she so persistently refuses he may sue for nullity.¹ But if he resort to main force to effect consummation, he is not guilty of rape, even if the marriage turn out void.² If, at the time of marriage, the husband is suffering from disease, his attempting while in this state to consummate the marriage is wrong and cruelty.³ But even if he, while suffering from a venereal disease, wilfully infects his wife, he cannot be convicted of assault in inflicting bodily harm,⁴ though it is matrimonial cruelty (see *post*, Chap. VII, s. 5 (c)). And it is clear law, fortified by the opinion of St. Paul, that after consummation the husband has a general right to have from time to time intercourse at pleasure with the wife.⁵ If a wife, even without good cause, occasionally withdraws herself from her husband's bed, it will not justify cruelty and insult on his part.⁶

Several American cases have ruled that a gross abuse

see *post*, s. 5, p. 200. Under the present state of the law, Mr. and Mrs. Connolly's agreement might be valid and enforceable, especially after *R. v. Jackson* (1891), 1 Q. B., 671, C. A., see *ante*, 167; see, too, 1 Cor. vii. 5, and *post*, p. 172, Chap. X, s. 1.

¹ *G. v. G.* (1871), L. R., 2 P. & M., 287; *H. v. P.* (1873), L. R., 3 P. & M., 126; *N. v. A.* (1878), 3 P. D., 72; and see *post*, Chap. V, p. 207.

² 1 Hale, P. C., 629.

³ *Giocci v. C.* (1853), 1 Ecc. & Ad., 121, p. 131.

⁴ *R. v. Clarence* (1888), 22 Q. B. D., 23.

⁵ 1 Cor. vii. 3, 4.

⁶ *Saunders v. S.* (1847), 5 N. of C., 408, p. 421; *Rowe v. R.* (1865), 4 Sw. & Tr., 162.

of marital rights, *i.e.* persistently insisting in continuous marital intercourse with a knowledge that it will injure the wife's health, is cruelty ;¹ and in an English case it was admitted as an allegation of cruelty, that the husband insisted on consummation too soon after childbirth,² and that he insisted on sleeping with his wife while suffering from smallpox.³ Further, this right of the husband to marital intercourse was limited by the rule of the Canon Law, that marital intercourse is sinful on fast days, or after receiving the Host, or in a public or consecrated place.⁴

As to the husband's duties in affording, or what is the same thing, the wife's right to, the matrimonial intercourse, it is the husband's duty to consummate the marriage. In default of consummation she can sue for nullity (see *post*, Chap. V, p. 203). In such suits medical men have frequently given evidence that marital cohabitation without intercourse was injurious to the wife's health.⁵

¹ *English v. E.* (1876), 27 N. J. Eq. (17 C. E. Green), 579, where the earlier cases are cited.

² *Geils v. G.* (1848), 6 N. of C., 97, pp. 100, 146, 147 ; and see Sanchez, bk. ix., disp. 21, 22, as to sexual intercourse during the period of pregnancy or menstruation. By the Factory and Workshop Act, 1891, there is a prohibition on employing a woman within four weeks after childbirth, 54 & 55 Vict., c. 75, s. 17.

³ *Greenway v. G.* (1848), 6 N. of C., 221, p. 227.

⁴ See Sanchez, bk. vii., disp. 7 or 21, and bk. ix., disp. 12 and 13 ; and see the rubrick at the end of the *Missa pro sponso et sponsa*. Sanchez devotes the whole of bk. ix., of 147 folio pages double columns, to writing *de debito conjugali* ; the treatment of the subject, replete with absurd obscenities, affords an argument against the practice of the Confession. St. Alphonso de Liguori honestly laments the extreme indecency of the topic, but declares that it is so frequently referred to in the confessional that he feels obliged to discuss it at length. Gury approves and follows Sanchez's doctrines thereon ; and see *ante*, p. 74, n. 3.

⁵ *Pollard v. Wybourn* (1828), 1 Hag. Ec., 725 ; *Scott v. Jones* (1842),

And further, after consummation throughout the subsequent married life, she has a right to marital intercourse. If the husband makes default in affording marital intercourse, it is not cruelty,¹ though it may be given in evidence as a recriminatory plea, alleging neglect and misconduct conducing to an adultery in bar to an action for divorce instituted by such a husband on the ground of the wife's adultery; for, as Lord Stowell says, if a wife is without her consent deprived of her lawful pleasures, the husband should not feel surprised if she resorts to unlawful pleasures;² still, though far from immaterial and proper to be given in evidence, such default will not, standing alone, constitute in itself a bar to an action of divorce.³ Nor is it desertion so as to entitle the wife to the remedy of restitution of conjugal right, for though it is not sufficient compliance with an order for restitution of conjugal rights that a husband has provided his wife with a suitable establishment and sufficient income,⁴ yet if the parties are living together in the same house, the Court does not, for obvious reasons, pretend to enforce marital intercourse; and so where a wife sued, alleging that though allowed by her husband to reside in the same house with him,

"She was denied access to his person and bed,"

2 N. of C., 36; *F. v. D.* (1865), 4 Sw. & Tr., 86; and see the evidence of the celebrated Dr. Brouardel in a Canon Law case in France, June 15, 1890, *Acta S. S.*, vol. xxiii., pp. 156-164; and see *post*, p. 203.

¹ *D'Aguilar v. D'A.* (1794), 1 Hag. Ec. R., 773; *Cousen v. C.* (1865), 4 Sw. & Tr., 164; *Evans v. E.* (1813), 2 N. of C., 470, p. 474.

² *Forster v. F.* (1790), Hag. Con., 145, p. 154.

³ *Rowe v. R.* (1865), 4 Sw. & Tr., 162.

⁴ *Weldon v. W.* (1883), 9 P. D., 52; and see 47 & 48 Vict., c. 68; and see *post*, Chap. X, s. 1.

the Court decline to interpose and register the libel, saying—

“The precedent sought to be established would lead to an infinity of suits, in no one of which the Court could embark with any reasonable proposal of satisfying or doing justice between the parties.”¹

As to the proper frequency with which the husband should afford marital intercourse, the Roman Law, the Talmud, and other systems contain minute rules on the subject.² The New Testament declares, “Let the husband render unto the wife due benevolence, and likewise also the wife unto the husband.”³ The binding efficacy of vows of abstinence is much discussed in Sanchez.⁴

When it is said that a husband has a right of intercourse with his wife, it is meant that it is a personal right, and cannot be delegated. And if, without her consent, he helps or permits another man to have intercourse with his wife, it is rape, or conspiracy to rape. So when Lord Audley incited his servants to have intercourse with his wife, and held Lady Audley while a servant, Brodway, had intercourse with her, his wife was allowed to be witness against him, and he was convicted by the House of Lords of rape on his wife in two counts as principal and agent, and being sentenced to death, was beheaded.⁵ If, with her consent, he allows another person to have intercourse with her, it is connivance (see *post*, Chap. VII, s. 3); and if he “procures” her to have intercourse with some other person, it is a criminal offence (see Chap. XV, s. 5).

¹ *Orme v. O.* (1824), 2 Ad. Ec., 382.

² Mishna, 24 (Ketuboth), chap. v., sec. 6, translated by Sola & Raphall; Selden's *Uxor Ebraica*, bk. iii., chaps. vi., vii.; Gibbon's *Decline and Fall*, chap. xlv.

³ 1 Cor. vii. 3.

⁴ Bk. ix., *De Debito Conjugali*; see *ante*, p. 74, n. 3, and p. 170, n. 4.

⁵ *R. v. Lord Audley* (1631), 3 St. Tr., 401; and see Chap. XV.

Further, the husband is only entitled to have intercourse with the wife in a natural way, and not unnaturally; and if he do so without her consent it is a cause of divorce.¹ It is her duty to resist to the utmost, and he may be convicted criminally.² And further, he and she ought not to use unnatural means for preventing conception; and where a husband compelled his wife to submit to using "certain coverings" on sexual intercourse, this was admitted as an allegation of cruelty.³ This subject of preventing conception is treated of at length as a moral sin by the Canonists.⁴

(c) *Chastisement*

A husband was never allowed to kill his wife, for that was murder;⁵ but by the old law a husband may beat her, but not in a violent and cruel manner;⁶ and in the writ available to a wife asking for the peace against her husband for excessive correction, this right of reasonable chastisement was recognised.⁷ However, in the time of Charles II this began to be doubted, and Chief Justice

¹ *Geils v. G.* (1848), 6 N. of C., 97, pp. 101 and 148-164; *N. v. N.* (1862), 3 Sw. & Tr., 234. The Canon Law considers it a lighter offence than adultery (Sanchez, bk. ix., chap. xviii.), and in certain cases even permissible (*ib.*, disp. xvii.).

² *R. v. Jellyman* (1838), 8 C. & P., 604.

³ *Greenway v. G.* (1848), 6 N. of C., 221, 231.

⁴ Sanchez, bk. ix., disp. 18-20. There is a recent pronouncement by the Vatican, in answer to an inquiry on this point by a French bishop on behalf of a married couple in his diocese, in which the practice is condemned. This declaration is reported in the *Acta S. Sedis*; but the author, although he has read it, has unfortunately lost the reference; he would be obliged if one of his readers would furnish him with it.

⁵ Per Cur. in *Manby v. Scott* (1660), 2 Sm. L. C.

⁶ Bacon's Abridgment, tit. Baron & Feme.

⁷ Fitzherbert, *Natura Brevium*, 80; but even then on excessive chastisement the wife might either have a writ of supplicavit in Chancery, or swear the peace against her husband, who thereupon might be bound to good behaviour, but not removed from the wife; see

Hale laid it down that the chastisement alluded to in the writ was at the most but one of admonition and confinement to the house¹ (but now a husband cannot even confine his wife to the house, see *ante*, p. 167); and so the legal right for a husband to chastise his wife is obsolete, even if she be drunk.²

"Yet the lower rank of people, who were always fond of the old Common Law, still claim and exert their ancient privilege."³

A wife has no right to beat her husband; if she does it, it is cruelty (see Chap. VII, s. 5 (c)), and he may swear the peace against her.⁴

(d) *Control*

It is the law of religion and the law of the country that the husband is entrusted with authority over his wife.⁵ He is to practise tenderness and affection, and obedience is her duty.

"For the happiness and honour of both parties it places the wife under the guardianship of the husband, and entitles him for the sake of both to protect her from the danger of unrestrained intercourse with the world."⁶ The husband hath by law power and dominion over his wife."⁷

There is general right of the husband to the control and custody of his wife.⁶ "A husband is not to be deprived of his marital rights because a wife pertinaciously resists them."⁷ But when she submits to her husband, restraint is illegal,⁶ for—

Shelford, *Marriage and Divorce*, pp. 671-676. Fitzherbert, *Natura Brevium*, 235, 239.

¹ *Lord Leigh's case* (1684), 3 Keble, 433.

² *Pearman v. P.* (1860), 1 Sw. & Tr., 601.

³ Blackstone, *Com.*, bk. i., 444, Husband and Wife.

⁴ *Sim's case* (1734), 2 Str., 1208; and see Chap. XV, s. 5.

⁵ Per Lord Stowell, *Oliver v. O.* (1801), 1 Hag. Con., 361, pp. 363, 372.

⁶ Per Coleridge, J., *in re Cochrane* (1840), 8 Dowl., 630.

⁷ Bacon's Abridgment, tit. Baron & Feme.

“By the law of England she is entitled to all reasonable liberty, if her conduct is nothing bad ; but where the wife will make an undue use of her liberty, either by squandering her husband's estate or going into lewd company, it is lawful for the husband, in order to preserve his honour, to lay such wife under a restraint.”¹

Of what is the proper conduct and behaviour of a wife, the husband is the sole judge ; but if the husband attempts to abuse his marital power by any wanton and excessive exercise of it, the Courts will interpose ;² and further, it is cruelty.

“The husband is the person to direct the expenditure as well as to control the establishment and direct its management.”³ And “if a wife violates the rules and regulations of her husband, provided they are not absolutely absurd and irrational, he has a right to complain of it.”⁴

And generally it is the duty of a wife to conform to the tastes and habits of her husband, to sacrifice much of her own comfort and convenience to his whims and caprices, to submit to his commands, and “ensure her own safety by lawful obedience and by proper self-command.” But this rule can only apply where there is no actual ill-treatment to life or health. Mere want of affection, coarseness of language, abuse, is not cruelty. But where a Lord Dysart, a person of very peculiar and extraordinary habits, had continually disregarded his Countess's wishes and comfort, forcing her to submit to unnecessary privations and hardships totally inconsistent with their respective rank and fortune, merely in order to annoy her, and openly avowing his dislike to her, the Court refused to compel her to return home to a husband who, in order to gain his end, has recourse to any kind of

¹ *R. v. Lister* (1721), 8 Mod., 22 ; 1 Str., 477 ; and see *Atwood v. A.* (1718), Pr. in Ch., 492 ; but this is not now the law after *R. v. Jackson* (1891), 1 Q. B., 671, C. A. ; see *ante*, p. 167.

² Per Coleridge, J., in *re Cochrane* (1840), 8 Dowl., 630.

³ *Dysart v. D.* (1847), 1 Rob. Ecc., 106, 470.

⁴ *Wallscourt v. W.* (1844), 5 N. of C., 121, pp. 133, 134.

ill-treatment short of thrashing her, and imagined in so doing he has legal authority.¹

Still, "without disparaging the just and paramount authority of a husband, it may be safely asserted that a wife is not a domestic slave, to be driven at all cost short of personal violence into compliance with her husband's demands." "A man who sets about to achieve this end by purposely rendering a woman's daily life unhappy, is in danger of overstepping his rights, as he is pretty sure to fall short of his duties."²

For instance, a clergyman, saying it was "affectionate discipline," adopted a deliberate system of conduct towards his wife, which resembled the solitary prison system. He refused to associate himself or speak to her except for the purpose of putting her sin (which was imaginary) before her in strong, coarse, and abusive terms, using the same language as would be applicable to an adulteress, while her conduct had been perfectly innocent, submissive, and unprovocative. The result of this treatment was that her health was not only seriously imperilled, but she was exposed to the highly probable consequence of paralysis and madness. Her husband, however, declared it was the duty of a Christian wife to say—"It is not necessary for me to improve in health, or even to live." The Court declared such conduct to be cruelty, and decreed a judicial separation.³ In this case the Court laid down that if force, physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her

¹ *Dysart v. D.* (1847), 1 Rob. Ecc., 100, 470.

² *Kelly v. K.* (1869), L. R., 2 P. & M., 31, 59; and see per Sir Herbert Jenner Fust in *Saunders v. S.* (1847), 5 N. of C., 408, pp. 419, 420, 421: "For those who are resolved to go to the edge of the law are the most likely to overstep the bounds which their fear, not their sense of duty, prescribes to them;" and see *Dysart. v. D.*, *ubi sup.*, p. 530; and *Mytton v. M.* (1886), 11 P. D., 141.

³ *Kelly v. K.* (1869), L. R., 2 P. & M., 31, 59; and see this case quoted at greater length, *post*, Chap. VII, s. 5 (c).

health and render a serious malady imminent, although there is no actual physical violence, it is legal cruelty; for many acts which are venial in themselves become reprehensible when they take their places as parts of a system. Others justifiable on occasions lose their justification when continuously and purposely repeated.

A husband has a right to interdict his wife's intercourse with her own family, either by forbidding her to visit them, or forbidding them to come to his house, or both. It is a harsh exercise of marital authority, yet standing alone it is not cruelty. Further, he may be justified; for though a wife may be very amiable, yet her connections may not be so, and there may be many reasons which may justify such exclusion. Still, as it might tend to illustrate the husband's conduct, especially if part of a system (see *ante*, p. 176), it may be pleaded in a suit for cruelty, and the Court will consider if the husband exerted his right in a proper manner.¹ And there is good reason for such power of control by the husband, for the law makes him civilly liable in damages to third parties for her torts, *i.e.*, wrongs committed since marriage.²

A husband has a right to all his wife's time and services, and it is on this account he has a right of action for torts committed against her (see *post*, p. 183).

But after the decision in *R. v. Jackson*,³ explained above, it would appear that the husband's right of control is merely a moral right; that if she either elope from the

¹ *D'Aguilar v. D'A.* (1794), 1 Hag. Ecc., 773; *Waring v. W.* (1813), 2 Hag. Con., 153; and *Neeld v. N.* (1831), 4 Hag. Ecc., 263, p. 269.

² *Seroka v. Kattenburg* (1886), 17 Q. B. D., 177.

³ (1891), 1 Q. B., 671, C. A. (see *ante*, p. 167); the correctness and policy of this decision, and the way in which it was delivered, were at the time much questioned; see *inter alia*, L. J., vol. xxvi., pp. 416, 433.

house altogether, or go out at times and behave in a manner displeasing to him, he has no remedy at law, and cannot right himself by his own hand. Such conduct, however, if sufficiently continued, may result in her being guilty of the matrimonial offence of desertion (see *post*, Chap. VII, s. 5 (*d*)); and if he suspects her of adultery, it is the husband's right, nay, his duty, to separate from her; but if, without committing adultery, the wife elects to use the matrimonial domicil as a hotel, coming and going at her own pleasure, it does not seem that (short of locking her out, and his right to do this is doubtful) a husband has any remedy; and this is the result of *R. v. Jackson*.

For further instances, see "Cruelty" and "Desertion," Chap. VII, s. 5 (*c*) (*d*).

As to right to custody of a lunatic wife, see Chap. VII, s. 5 (*c*), and refer index tit., "Lunatic," "Lunacy."

(*e*) *Maintenance*

Correlatively to the rights of the husband, previously explained, it is the husband's duty to support and keep the wife, supplying her with necessaries, *i.e.*, food, drink, lodging, fuel, washing, clothing, medical attendance, suitable to the position of the husband.¹

The cases illustrating this duty usually, if not invariably, arise in actions by tradesmen seeking to render the husband liable for goods ordered by the wife, of which the most famous is the leading case of *Manby v. Scott*.²

Different principles apply in the case when the husband and wife are cohabiting, to when they be living apart.

Firstly, when husband and wife are cohabiting there

¹ Bacon's Abridgment, tit. Baron & Feme (*h*); and see Salkeld, *ib*

² See Smith, Leading Cases, vol. ii., where the principal cases following this are given.

is a *prima facie* presumption that she has his authority as his agent to pledge his credit for household supplies and necessities for herself, and the presumption is stronger if she has been previously permitted by him to purchase household articles; and this remains even though the wife be guilty of adultery during cohabitation. But this presumptive authority may be rebutted by proof that the husband had forbidden the wife to pledge his credit even though the tradesman did not know of the prohibition, and it may further be shown that she was already sufficiently provided with these goods, so that there is no implied authority to order them.

Secondly, as to when they be living apart, and here the liability varies according to whose fault it was that occasioned the separation.

When husband and wife live separate, it is incumbent on any tradesman with whom the wife deals to make inquiries; and if necessities are supplied, mere proof of the fact of separation is not sufficient, the tradesman must prove that the separation occurred under such circumstances as give the wife an implied authority to bind the husband, *i.e.*, that it amounted to a desertion by the husband. In case the separation arose by the husband's default, either because he turned her out of the house or made it impossible for her to live there from his cruelty or misconduct, by, *e.g.*, bringing a mistress into the house, he will be liable for necessities supplied to her even though he has given a notice not to trust her. But if he makes and pays her a suitable allowance, he will not be liable. In case the wife elope from the husband, being guilty of adultery, or is expelled by him on that account, or leaves him of her own will causelessly without his being guilty of adultery or cruelty, he will not be liable; except that if after conniving at the adultery he should

expel her, he will be liable. If they separate by mutual consent and agree on the allowance, and it is paid, the tradesmen cannot dispute its sufficiency, and render the husband liable by alleging it is too small.

Necessaries.—As to what goods the husband will be liable for (if at all) during separation, he can only be liable for necessaries, including therein necessaries for children lawfully in her custody; during cohabitation he may be liable for goods not necessaries, but in such cases more special proof of authority than the general *prima facie* presumption above mentioned is required to render the husband liable for luxuries.

Generally what are necessaries is a question for the jury, though it is for the Court to say if there is no evidence on which the jury could properly find the goods supplied were necessaries, and if so to refuse to leave the case to the jury.

As an instance, it may be mentioned that jewellery to the extent of £85 is not a necessary for the wife of a special pleader; but in all cases necessaries vary according to the station and means of the husband and the style in which he lives.

Lastly, money lent to the wife to purchase necessaries is recoverable in the same way as necessaries, but only if the necessaries bought therewith would be chargeable against the husband.¹

It may be, however, that the husband has no credit, and it is impossible for the wife to be so supplied. In

¹ The law on this subject is entirely judge-made, depending on a great number of cases, most of them decided more than fifty years ago. The above summary of the law is taken from Chitty on Contracts, 12th ed., chap. viii., sec. 2, pp. 272-86, to which the professional reader is referred. The most recent cases on this subject are *Phillipson v. Hayter* (1870), L. R., 6 C. P., 38; *Debenham v. Mellon* (1880), 6 App. Ca. 24; *Wilson v. Glossop* (1888), 20 Q. B. D., 354, C. A.

such case, either because she is starving or deserted, she may, however, apply for poorhouse relief; and on her becoming chargeable, the Guardians can summon her husband before Petty Sessions, and an order for payment to be enforced by imprisonment may be made against him,¹ as he may be convicted of being a rogue and a vagabond.² If he force her to leave him owing to his ill-treatment, and she becomes chargeable, he may be compelled to contribute to her support,³ but cannot be convicted as a rogue of deserting her.⁴

Further, by a recent Act, a wife deserted by her husband can, without going into the workhouse, summon her husband before the Petty Sessions, and the Court may then order him to pay the wife a weekly sum not exceeding £2, and enforce their order by imprisonment.⁵

But in no case, if the wife has committed adultery, can the husband be convicted for deserting as a rogue,⁶ or ordered to contribute to her maintenance in the Union,⁷ or pay her maintenance.⁸

It was further the practice of the Court of Chancery, in case a husband deserted or ill-used his wife or became insolvent, to allow her maintenance out of property coming to him in her right; but owing to the operation of the Married Women's Property Act, vesting such property in the wife solely and separately (see *post*, p. 188), the opportunities for the exercise of this power will become rare.⁹

¹ 31 & 32 Vict., c. 122, s. 33.

² 5 Geo. IV, c. 83, s. 3.

³ *Thomas v. Alsop* (1870), L. R., 5 Q. B., 151.

⁴ *Flannagan v. Bishop Wearmouth Overseers* (1857), 8 E. & B., 451.

⁵ 49 & 50 Vict., c. 52; see *post*, Chap. IX, s. 4.

⁶ *R. v. Flintan* (1830), 1 B. & Ad., 227.

⁷ *Culley v. Charman* (1881), 7 Q. B. D., 89.

⁸ 49 & 50 Vict., c. 52, s. 1 (2); see Chap. IX, s. 4.

⁹ See for the old cases, Roper on Husband and Wife, vol. i., chap. vii., sec. 2; this was on the doctrine of her equity to a settlement; see *post*, pp. 186, 189.

Questions as to insufficient maintenance of a wife by a husband may also arise under a charge of cruelty, on which it has been decided that the supply of inferior quality of food is not cruelty.¹

It is not the duty of a wife to maintain her husband out of her separate property, and when she buys household supplies and necessities it is not assumed that she makes her separate estate liable.² But if her husband becomes chargeable to the Union, and she has separate property, she may, by the Married Women's Property Act, 1882, be made to contribute to his maintenance in the way in which he may be made, under 31 & 32 Vict., c. 122 (see *ante*, p. 181), to contribute to her maintenance.³

(f) *Household Management*

And though it is usual for a wife to manage the household by hiring servants, ordering meats, etc., and paying bills, yet she has no right thereto, and the husband can himself assume that authority. As Lord Stowell laid it down—

“I cannot call it cruelty if a gentleman chooses to settle his weekly bills himself, because I take it that a wife acts in this respect, not by any original right, but as steward and representative of her husband. And if a man has but a moderate opinion of his wife's management, and is vain enough to have a better of his own, if he does choose to take into his own hands the payment of the weekly bills, I protest it does appear to me to be that kind of conduct with which no magistrate, ecclesiastical or civil, has any right to interfere.”⁴

As to a wife's right to draw and sign cheques in the husband's name, Lord Stowell laid it down—

“I protest I have never understood it to be part of the prerogative of the wife that she shall have the right to draw for what she likes upon

¹ *Dysart v. D.* (1817), 1 Rob. Ecc., 470, pp. 485-489; *Evans v. E.* (1840), 2 N. of C., 470, p. 474; as to cruelty, see Chap. VII, s. 5 (c).

² Chitty on Contracts, 12th ed., p. 233.

³ 45 & 46 Vict., c. 75, s. 20.

⁴ *Evans v. E.* (1790), 1 Hag. Con., 35, p. 115.

the banker of her husband. The purse is the husband's,¹ and withdrawing her credit at the banker's is not cruelty."

And a wife cannot give a person authority to enter her husband's house.²

(g) *Injuries to Wife*

The husband previous to the Matrimonial Causes Act, 1857, had the action of criminal conversation against the adulterer, which is now converted into damages against the co-respondent; see *post*, Chap. VII, s. 2 (f). Where there was no adultery, he could also maintain the action for harbouring and sheltering his wife;³ but as long as the decision in *R. v. Jackson*⁴ remains law (establishing the wife's free will, see *ante*, p. 167), it would seem that this action could not be maintained.⁵

If a wife is abducted against her will, this was anciently a felony.⁶ But now for this and other injuries done to the wife, where she becomes less serviceable to the husband, there accrues to the husband an action of trespass sounding in damage; and this separate right of action is still available to the husband notwithstanding that by the Married Women's Property Act, 1882, the wife also can sue, because previously the husband had a several as well as a joint right of action.⁷ And if she is

¹ *Evans v. E.* (1790), 1 Hag. Con., 35, p. 123.

² *Taylor v. Fisher* (1592), Cr. Eliz., 246.

³ *Lewis v. Ponsford* (1838), 8 Car. & P., 687; *Philp v. Squire* (1791), 1 Peake, 82, 114, and cases there cited.

⁴ (1891), 1 Q. B., 671, C. A.

⁵ The last instances of this action were *Steeds v. Offord*, the Times, January 29, 1892, p. 10; and *Wallis v. Carr*, the Times, May 14, 1892, p. 17; but in both cases the plaintiff was unsuccessful.

⁶ Hale's P. C., chap. lix., p. 636, citing 13 Ed. I, c. 34; and see *post*, Chap. XV.

⁷ *Weldon v. Winslow* (1884), 13 Q. B. D., 784, C. A.; see *Brockbank v. Whitehaven Junction* (1862), 7 H. & N., 834; and see Bullen & Leake,

killed by negligence, the husband can recover damages under Lord Campbell's Act.¹

SEC. 2.—RIGHTS OF PROPERTY

(a) *Generally*

The rights of husband and wife as to property are almost universally among the wealthier classes regulated by settlement (see *post*, s. 3); in fact, it is professionally incumbent on a lawyer advising, in the case of a married woman, to inquire if there is a settlement. This section deals with the rights of property in case there is no settlement, and supposing there is a settlement, in so far as the property is not affected by it; for the Married Women's Property Act, 1882, explained *infra*, expressly enacts that nothing in the Act shall interfere with or affect any settlement or agreement for settlement, whether such settlement is entered into before or after the marriage.² And as a settlement frequently contains a covenant by either husband or wife, or both, to settle after acquired property, it often happens that property coming to the wife absolutely, subsequent to her marriage, is regulated by the provisions of the previous settlement. But in each particular case it is a question of construction, regarding the class of property acquired and the wording of the covenant, whether such property is included and bound by the covenant, or passes free from the covenant.

The rights of husband and wife after the other's death, in his or her real and personal property by way of dower,

4th ed., pt. 1, Statements of Claim in Actions on Wrongs, tit. Husband, p. 436. Chitty on Pleading Declarations on Trespass, 7th ed., vol. ii., pp. 651, 652; and see the most recent book by Minton-Senhouse on the Employers' Liability Act.

¹ 9 & 10 Vict., c. 93.

² 45 & 46 Vict., c. 75, s. 19.

curtesy, intestate succession, and the right of a married woman to make a will, are treated of in another book of this series,¹ so the present section is still further restricted to the rights of husband and wife in property during each other's life and the continuance of the marriage. The effect of nullity, divorce, or judicial separation in rights of property is considered *post*, Chap. XI, ss. 3, 4, and Chap. XIII.

Now the wife has not, and never had, any interest in the husband's property during his life, whether coming to him previous or subsequent to the marriage, though the husband is, to some extent, liable for her debts and engagements (see pp. 178, 190). But the rights of a husband in his wife's property, which were originally very large, have been subject to such diminution since 1870 that her proprietary rights cannot be understood without the history of their development, showing what of the former rights still exist.

(b) *Prior to 1883*

That a wife should alienate or settle her property previous to marriage without her husband's knowledge, is a fraud on his marital rights; the conveyance may be set aside.² As to the freehold land belonging to the wife before or after marriage, the husband took an estate for the joint lives of himself and his wife, and he was entitled to the rents and the sole control, and he could convey such land for such estate.³ When entitled to curtesy

¹ Wills and Intestate Succession, by James Williams, B.C.L., M.A.

² *Strathmore, Countess of, v. Bowes* (1789), Wh. & Tu.'s L. C., vol. i., where the subsequent cases are noted up, but the principle is becoming obsolete owing to the Married Women's Property Act, 1882; see *post*, 188.

³ *Robertson v. Norris* (1848), 11 Q. B., 916.

by issue being born alive, who might be heir to his wife, he has in him, and can convey an estate for his own life.¹

As to leasing of the wife's land, the husband alone by the Settled Estates Act, 1877, can lease for twenty-one years ;² and by Settled Land Act, 1882, husband and wife together should have the power of a tenant for life under the Act, and can therefore lease in accordance with its provisions.³ Further, if the husband alone make a lease, the wife by receiving rent after his death may confirm it.⁴

So also neither husband nor wife could sell the wife's land and convey the fee, except by deed executed by both and acknowledged by the wife after separate examination, under the Fines and Recoveries Act, 1833.⁵ And when the husband is a lunatic or living apart from her husband, the Court may dispense with his concurrence in the conveyance under that Act ; but this is without prejudice to his Common Law right.⁶

As to the wife's personalty, leaseholds, and chattels, the husband took them absolutely, and could sell and assign them. But if they were " choses in action," that is to say, requiring legal proceedings to reduce them into possession, the Court of Chancery used to interpose and require him to settle all or part of such property on her and the children ; this was called the wife's " equity to a settlement ;" in some cases the Court gave the whole to the husband. By no consent out of Court could she debar herself, but by consent in Court she could waive her equity and defeat the children's rights.⁷

¹ *Hope v. H.* (1892), 2 Ch., 336.

² 40 & 41 Vict., c. 18, s. 46.

³ 45 & 46 Vict., c. 38, s. 61, sub-s. 3.

⁴ *Toler v. Slater* (1867), L. R., 3 Q. B., 42.

⁵ 3 & 4 Will. IV, c. 74, as to levying of fines ; see another book of this series on Real Property, by A. R. Rudall and C. Slagg.

⁶ 3 & 4 Will. IV, c. 74, s. 91 ; and see *post*, Chap. XIII.

⁷ See *Elibank, Lady, v. Montolieu*, and *Murray v. Lord Elibank*,

As to the wife's reversionary interests in personalty, the husband alone cannot, but the husband and wife together — she acknowledging her deed after separate examination under Malins Act, 20 & 21 Vict., c. 57 — can dispose of it.¹

In default of the husband reducing into possession this personalty, it survives to the wife and becomes hers absolutely. Then the Married Women's Property Act, 1870, 33 & 34 Vict., c. 93, which came into force on August 9 in that year, gives certain property to the wife as her separate property independent of her husband: firstly, her wages or earnings acquired or gained thereafter in any employment, occupation, or trade carried on separately from her husband;² and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and the investments of the same.³ Secondly, in case of women married after August 9, 1870, and without prejudice to any settlement affecting the same, any personal property to which she should become entitled during her marriage as next of kin or one of the next of kin of an intestate, or any sum of money not exceeding £200 coming to her under any deed or will;⁴ and, thirdly, in like case of a woman married after August 9, 1870, and without prejudice to

White and Tudor's Leading Cases, vol. i., and notes thereto. The most recent cases are *Reid v. R.* (1886), 33 Ch. D., 220, where the whole fund was settled on the wife, *in re Briant* (1888), 39 Ch. D., 471; *Roberts v. Cooper*, (1891), 2 Ch., 335, C. A.; but the doctrine by force of the Married Women's Property Act, 1882 (see *post*, p. 188), is tending to grow obsolete; an early case of an equity to a settlement is reported, *Shipton v. Hampson* (1674), Cases time of Finch, 145; and *Tarfield v. Davenport* (1639), Tothill, tit. Injunction, pp. 87, 114.

¹ The two most recent cases, *Roberts v. Cooper*, *ubi sup.*, C. A.; *Witherby v. Rackham*, W. N. (1891), p. 57.

² For separate trading, see *post*, 197.

³ 33 & 34 Vict., c. 93, s. 1.

⁴ *Ib.*, s. 7; see *re Voss* (1880), 15 Ch. D., 504.

any settlement, the rents and profits of any freehold, copyhold, or customary hold property descending upon her as heir or coheirress of an intestate.¹

(c) *The Married Women's Property Act, 1882*

But these partial changes were only by way of preparing the way to the much greater change brought about by the Married Women's Property Act, 1882, 45 & 46 Vict., c. 75.

This Act, almost extinguishing or making defeasible marital right of property, and giving a married woman separate property, aimed at putting her as regards such separate property in the same position as if she were unmarried. For it enacted² that

"A married woman shall, in accordance with the provision of this Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property, in the same way as if she were a *feme sole*, without the intervention of any trustee," and that she "shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing or being sued either in contract or in tort or otherwise, in all respects as if she were a *feme sole*."

As to what this separate property consists of, with a renewal of previous vested rights, it practically amounts to investing a married woman with separate property in everything coming to her by inheritance or by her own exertions. For the Act provides as to a woman married after the commencement of the Act (Jan. 1, 1883), that they

"Shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid (*i.e.*, as a *feme sole*), all real and per-

¹ 33 & 34 Vict., c. 93, s. 8; see *Johnson v. J.* (1887), 35 Ch. D., 345.

² S. 1 (1) (2). As a will of a married woman, see a manual of this series on Wills and Intestate Succession, by James Williams, B.C.L.; and see *re Bowen* (1892), 2 Ch., 291.

sonal property which shall belong to her at the time of the marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.”¹

As to a woman married before the commencement of the Act, it provides that she

“Shall be entitled to have and to hold, and to dispose of,” as a *feme sole*, “all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act (Jan. 1, 1883), including any wages, earnings, money and property so gained and acquired by her as aforesaid.”²

This has been interpreted to mean that if a woman married before the Act has before the Act (Jan. 1, 1883) acquired a *title*, whether vested or contingent, and whether in reversion or remainder, to any property, such property is not made her separate property though it fall into possession after the Act, as, *e.g.*, by the determination of a life interest.³ Such property, therefore, will go to the husband according to the previous law as a case therein included, according to the Married Women's Property Act, 1870; and when going to the husband be subject first to the wife's equity to a settlement (see p. 186).

By all property so vested in her separately she is to hold as if she were unmarried, and she can sue and be sued alone, and any damages recovered by her, even in tort, are her separate property;⁴ and see *post*, s. 4, Married Women's Contracts, p. 196.

She alone as well as her husband (as to which see *ante*,

¹ 45 & 46 Vict., c. 75, s. 2.

² S. 5.

³ *Reid v. R.* (1886), 31 Ch. D., 402, C. A.; but a *spes successionis* is not a title, *re Parsons* (1890), 45 Ch. D., 51.

⁴ S. 1; and see *Weldon v. Winslow* (1884), 13 Q. B. D., 784, C. A.

p. 183) can sue for torts committed against her; the damages recovered are her separate property;¹ but she cannot sue for any injury committed against her husband which makes him less able to support her.² Nor can she sue her husband's paramour or any one else who deprives her of his *consortium vitæ*;³ but if he is killed she can sue for damages under Lord Campbell's Act.⁴

And although a wife can, in certain cases, prosecute her husband for assaulting her, yet she cannot sue him civilly for damages in respect of such an assault.⁵

(*d*) *Husband's Liability for Wife's Torts, Debts, and Engagements*

A husband is liable for, and may be sued jointly with his wife in respect of, any wrongful act of hers, *e.g.*, libel committed during coverture, notwithstanding that at the plaintiff's option the wife may be sued alone.⁶ And this liability continues although husband and wife may be living apart⁷ under circumstances that disentitle her to pledge his credit and make him liable for debts (see *ante*, p. 179), unless there has been a divorce or judicial separation; as to the result of which see Chap. XIII.

As to antenuptial torts and debts, the old Common Law rendered the husband jointly liable with the wife, and neither husband nor wife could be sued alone.

Then the Married Women's Property Act, 1870, intro-

¹ *Weldon v. Winslow*, *ubi sup.*; *Beasley v. Roney* (1891), 1 Q. B., 509.

² See Clerk and Lindsell on Torts, p. 162.

³ *Lynch v. Knight* (1861), 9 H. L. C., 577; *Parkins v. Scott* (1862), 1 H. & C., 153.

⁴ 9 & 10 Vict., c. 93; and see the most recent book by Minton-Senhouse on the Employers' Liability Act.

⁵ *Phillips v. Barnett* (1876), 1 Q. B. D., 436.

⁶ *Seroka v. Kattenburg* (1886), 17 Q. B. D., 177.

⁷ *Head v. Briscoe* (1833), 5 C. & P., 484.

duced a change, entirely relieving husbands married between August 9, 1870, and July 30, 1874, from any liability for the wife's antenuptial debts;¹ but the Act of 1874,² as to couples married after July 1874, reimposed a limited liability as to torts and debts by declaring that the husband should be liable, but only to the extent to which he receives assets with the wife; and this is re-enacted by the Married Women's Property Act, 1882, repealing the former Acts.³

The liability of a husband for his wife's debts incurred during marriage has been previously considered under Maintenance, p. 178; and see also Agency of Wife for Husband, *post*, p. 199. As to the husband's right of action for torts committed against his wife, see *ante*, s. 1 (*g*), p. 183.

SEC. 3.—SETTLEMENTS

But from a very early date indeed, in order to avoid the marital rights and for other purposes, it became the practice previous to marriage, by a bargain between husband and wife, or as is more usual, between the husband's and the wife's parents, to settle on the wife either her own property, or property given by her relatives for her separate use independent of the husband, by conveying it to trustees; and such deed if done with the husband's knowledge is good, for the old law was for the husband's benefit and protection, and *quisque renuntiare potest jure pro se instituto*;⁴ if he did not know of

¹ 33 & 34 Vict., c. 93, s. 12, leaving untouched his liability for her antenuptial torts.

² 37 & 38 Vict., c. 50; the professional reader is referred for an elaboration of this subject to Chitty on Contracts, 12th ed., chap. viii., sec. 2, pp. 270-86; and see Clerk and Lindsell on Torts.

³ 45 & 46 Vict., c. 75, ss. 14, 15, 22.

⁴ See Lewin on Trusts, 9th ed., p. 850.

the settlement by the old law, it might be set aside as a fraud on his marital rights.¹

This, of course, only applied to property to which the wife was entitled on the date of the marriage, either in possession or reversion. But as to the property coming to her, or that might come to her, during the marriage, this could also be settled if the original settlement contained a covenant to settle after acquired property,² or by a post-nuptial settlement; but such post-nuptial settlements may in certain cases be invalidated by creditors.

A marriage settlement by an infant is, it would seem, voidable; however, it may be ratified by such infant. But by 18 & 19 Vict., c. 43, a man of twenty years old and a female of seventeen may validly settle by the sanction of the Court; but in so doing the infant must act of his or her free will, and cannot be compelled; if so, the settlement will be voidable.³

The provisions of settlements vary, of course, in each particular case. A settlement of real property usually has as an object the preservation and due devolution of a family estate, subject to pin money and a jointure to the wife and portions for the younger children. Such settlements are more fully considered in another manual of this series dealing with real property.⁴ It may, however, be here remarked that pin money is an annual sum settled on a wife to defray her personal expenses in

¹ *Strathmore, Countess of, v. Bowes* (1789); White and Tudor's Leading Cases, vol. i.; the husband has now so little marital right that the doctrine of fraud on marital rights will become obsolete; and see *ante*, p. 185.

² See Vaizey on Settlements, pp. 229-62.

³ *Leigh v. L.* (1888), 40 Ch. D., 290, C. A.; *Bolton v. B.* (1891), 3 Ch. 270, C. A.; *Hamilton v. H.* (1892), 1 Ch., 396; *Carter v. Silber* (1892), 2 Ch. 278, C. A.; and see Chap. XIV, s. 5 (a).

⁴ By A. R. Rudall and C. Slagg.

dress and pocket money, and of which not more than a year's arrears will be exacted against the husband, because it is meant for use and not to be accumulated; jointure is to maintain her after her husband's death, and bars dower.

In settlements of personality, the usual rule is to give each spouse a life interest in the property brought by each respectively in settlements. It is frequent to provide that the wife shall be "without power of anticipation," *i.e.*, she could only receive the income as it accrued due, and could not alienate; the effect of this is important on her contracts (see *post*, p. 196), but after becoming a widow such restraint ceases. Sometimes as regards the husband a similar effect is obtained by providing that his interest shall be forfeited on his becoming bankrupt or attempting to alienate, and go over to the wife.

After the death of either spouse, some settlements give a life interest in the whole or part of the funds to the surviving spouse; but this clause and the proportion to be given are usually matters of considerable discussion.

Subject to the life interest of husband and wife, the ultimate interest in the funds is usually given to the children, by empowering either or both of the spouses jointly or severally to appoint by will or deed the trust funds among the children or more remote issue, and in default of such appointment to be divided equally.

If there are no children—

"By a practice sufficiently general to form the rule and to entitle a deviation from it to be treated as an exception, property brought into settlement by the husband reverts, subject to the wife's life interest, to him or his estate, and the ultimate trusts (in default of issue) of the wife's property are for her absolutely if she survive the husband; and if she die in his lifetime, for such persons as she shall by will appoint, and in default of appointment, for her own family."

And a similar rule, though not so uniformly, applies where the funds are brought into settlement by the parents or relatives of the husband or wife. As regards the wife, however, whether the funds are brought into settlement by her or by her parents and relations, but in that latter case with more justification, it occasionally is stipulated that there should be an absolute and indefeasible trust for the next of kin of the wife. This, however, is wrong, for

“On every principle of justice and common sense, the wife’s property should revert to her absolutely, otherwise she is worse off than if she had not married, and is precluded from settling her property on a second marriage.”

Such clauses are usually the result of improper persuasion and representations by relatives, and no professional man should insert them without clearly explaining to the future wife what will be the effect of these provisions, and their unusual character, and taking care she thoroughly understands them.

But “a father living on affectionate terms with his daughter is the proper person to recommend and advise her and her natural agent in matters relating to the preparation and provisions of her marriage settlement, and there is no occasion for any independent legal advice beyond that of the family solicitor and conveyancer who is preparing the settlement. If, however, the father is taking under the settlement a benefit from the daughter, she ought to be separately advised.”¹

In practice it usually happens that as regards the wife’s life interest for her separate use, the income is actually received by, and the trustees pay to, the husband; and it has been

“Long settled that permissive receipt by the husband of the wife’s separate income shall be assumed to have taken place with his consent.”

And hence she is not allowed to charge him as her

¹ *Tucker v. Bennett* (1887), 38 Ch. D., 1, C. A.; and see *Hoblyn v. H.* (1889), 41 Ch. D., 200.

debtor, or to ask for an account against the trustees for money received, and

“The separate right of the wife to her income may be disregarded so long as all things go right, while capable of being called into immediate and efficient action should it be required for protection against her husband’s debts, or should circumstances induce the wife to deviate from the common course and require payment into her own hands.”

Trustees are not absolutely necessary to a settlement, for equity will not let a trust fail for want of a trustee; this is further enacted by s. 1 (1) of the Married Women’s Property Act, 1882. The settlement may be informally worded, but by the Statute of Frauds should be in writing.

The settlement usually contains powers for investing the trust money and appointing trustees.¹

Besides such bargain between husband and wife by way of settlement, property may be vested in a wife independently of her husband by a stranger’s gift, if he used proper words to effect this intention, which the law by the Married Women’s Property Act, 1882 (see *ante*, p. 188), now itself effects.²

Equity when giving the married woman a separate estate allowed her to alienate and contract to sell the separate estate as if she were a *feme sole*. As to her power of contracting, see *post*, p. 196.

It is sometimes difficult to find persons willing to act as trustees. In such a case it may be useful to appoint

¹ The whole of the above section on Settlements—a very detailed branch of equity—is a reduction of, and occasionally a quotation from the Introduction to Settlements contained in Mr. Davidson’s *Precedents to Conveyancing*, vol. iii., p. 1; a work of the very highest authority, and embodying and controlling the practice of conveyancers.

² For wording sufficient to effect this, see Lewin on Trusts, 9th ed., pp. 853–55; it is important in cases not falling within the Married Women’s Property Act, 1882.

one of the Trustee Companies, such as "The Guarantee and Trust Society Limited," of 9 Serle Street, Lincoln's Inn, London, W.C., or "The Trustees, Executors, and Securities Insurance Corporation Limited," of Winchester House, Old Broad Street, London, trustees of the settlement, with the right to make and deduct their usual charges. The appointment of a Trustee Company has the further advantage of saving beneficiaries trouble, loss, and expense arising from death, disappearance, etc., or fraud, misconduct, insolvency, etc., of an individual trustee.

SEC. 4.—MARRIED WOMEN'S CONTRACTS¹

(a) *Generally*

A married woman *per se* had at Common Law no power to contract; the fact of marriage deprived her of contractual power except as and when agent for her husband.²

As to her separate estate, however, equity allowed her to render it liable by engagements in writing or verbal contracts referring to it, but outside that neither she personally nor her separate estate is liable to her general creditors.³ This, however, is altered by the Married Women's Property Act, 1882, enacting, s. 1—

"A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property, on any contract, and of suing and being sued either in contract or in tort or otherwise, as if she were a *feme sole*. . . . Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property,

¹ The professional reader is referred for a full treatment of this subject to Chitty on Contracts, 12th ed., chap. viii., sec. 1, pp. 222-69, where this highly technical branch of law is discussed at greater length.

² *Marshall v. Rutton* (1800), 8 T. R., 545.

³ See Roper on Husband and Wife, 2nd ed., chap. xxi., sec. 2; Lewin on Trusts, 9th ed., p. 859.

unless the contrary be shown." "Every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of, or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

But in order to render a married woman's separate property liable, in order that the power to contract should have arisen, the plaintiff must prove that the married woman had separate property at the time of entering into such contract, and that such separate property was not restrained from anticipation; and even if the contract be good, recourse can only be had against her property, for she is not personally liable thereon, and so she cannot be made a bankrupt or committed under the Debtors Act therefor.¹ And execution can only be had against her separate estate according to a special form of judgment.

As to her antenuptial debts and liabilities, she remains jointly and severally liable to them as regards her separate property in addition to the liability imposed on her husband (see *ante*, p. 190); and no settlement by her on marriage shall be valid against her antenuptial debts further than in case of a husband.² But she cannot be made a bankrupt for her antenuptial debts, though it would seem she might be committed therefor under the Debtors Act, 1869.

Whether a married woman can without the consent, expressed or implied, of her husband, enter into a personal contract of service which may withdraw her from the cohabitation, *e.g.*, going into domestic service as a cook, or taking a theatrical engagement, is suggested by text writers as doubtful;³ but after the recent *Jackson* case

¹ See Manual in this series on Bankruptcy, by C. F. Morrell, pp. 30, 31.

² Married Women's Property Act, 1882, ss. 13, 14, 15, 19.

³ See Chitty on Contracts, 12th ed., chap. viii., pp. 229, 240, 241; Eversley's Domestic Relations, p. 916.

the doubts of the learned editors and authors appear unfounded. And by the Factory and Workshops Acts, 1878 to 1891, restrictions are placed upon the employment of women and young persons; and by s. 17 of the latter Act, the employment of a woman within four weeks after parturition is forbidden.¹

(b) *Separate trading*²

By custom of the City of London and outside it by the equitable separate property doctrine, and now by the Married Women's Property Act, 1882, s. 2, a married woman authorised by her husband to trade separately is entitled to the profits of such trade for her separate use. By separate trading it is not meant that husband and wife must be living apart, though in that case there certainly would be separate trading; or, on the other hand, that the wife manages a business for the husband as his agent (see *post*, p. 199, Agency); but that the business is that of the wife, and that the husband does not interfere, though he may assist. But a business originally the husband's may on his becoming incapable, or deserting her, when she thereafter carries it on alone, become the wife's separate trade.

When a married woman is a separate trader, she was by the custom of the City of London subject to bankruptcy; and now by the Married Women's Property Act, 1882, her separate property is to be subject to the bankruptcy laws as if she were a *feme sole*.³

¹ 54 & 55 Vict., c. 75, here the previous Acts are referred to; and see *post*, Chap. XIV, s. 5 (a).

² See Chitty on Contracts, 12th ed., chap. viii., s. 1 (c), pp. 258-62.

³ S. 1 (5); and see Manuel in this series on Bankruptcy, by C. F. Morrell, pp. 30, 31.

(c) *Contracts between Husband and Wife*¹

Marriage between obligor and obligee renders void their antenuptial contracts.²

As to contracts during marriage, although neither in common law nor equity could there be a contract between husband and wife, yet with respect to her separate estate, free from anticipation, she was competent in equity to contract with her husband;³ and this is confirmed by the Married Women's Property Act, 1882, which by s. 12 enables her to sue her husband, except in tort or by way of criminal prosecution. Such remedies by way of tort or prosecution are only available if husband and wife are not living together or about to desert; and a wife may in the same way be sued, or in certain cases of separation or desertion prosecuted (see s. 16), by her husband.

But if the wife lends to the husband money to be employed in his trade and he becomes bankrupt, she can only prove as a deferred creditor, for s. 3 of the Married Women's Property Act, 1882, provides—

“Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or moneys worth have been satisfied.”

(d) *Mutual Agency of Husband and Wife*

The wife may act as agent for the husband; she is in ordinary household management presumed to be his agent for purchasing domestic supplies (see *ante*, p. 178), but

¹ See for further treatment, Chitty on Contracts, 12th ed., chap. viii., sec. 3, pp. 286-93.

² *Post v. Nedham* (1611), 8 Coke Rep., 135a; *Butler v. B.* (1885), 14 Q. B. D., 831.

³ *Butler v. B.*, *ubi sup.*

beyond this she may act as his general or special agent ; but the fact of agency must be proved as strictly as in any other case of agency.¹

If the wife carries on a trade as the agent, express or implied, of the husband, she has implied authority to order trade goods, and the husband will be liable to such trade creditors ; and if he receives the profits this will raise a presumption that she carried on as his agent ; and see *ante*, Separate Trading, p. 198. The wife may also be the husband's agent by his assent to accept and indorse bills, or to make admissions so as to bind him.²

The husband may be, and indeed usually is, the agent of the wife to receive the income of her separate estate, in fact, by her acquiescence her assent thereto will be presumed ; but this will not be so as to the *corpus* of her estate.³ Further, third parties may rely on the husband's assertion of the genuineness of his wife's signature.

Also in trading, a married woman may appoint her husband to act as her agent with or without salary.⁴

SEC. 5.—SEPARATION DEEDS⁵

A separation deed, besides the invariable recital that unhappy differences have arisen between husband and

¹ See Manual in this series on Agency, by E. Blackwood-Wright.

² See Chitty on Contracts, 12th ed., pp. 273, 276, 277.

³ See Chitty on Contracts, 12th ed., pp. 252, 253. Davidson's Precedents to Conveyancing, 3rd ed., vol. iii., pt. 1, pp. 71-79, Introduction to Settlements. Lewin on Trusts, 9th ed., pp. 880-83 ; see *ante*, pp. 194, 195.

⁴ *Romer v. Koch* (1888), 56 N. Y. Sup. C. (49 H), 483.

⁵ A brief summary of the law on separation deeds may be found by the professional reader in Chitty on Contracts, 12th ed., pp. 289-93, and reference may be made to the notes to the forms of separation and deeds in Davidson's Precedents, 3rd ed., vol. v., pt. 2, pp. 667 and seq. ; and see *post*, pp. 220, 256, 259, 271, 272, 284, 339, 357, 376, 386, 390, 397, 441.

wife, and the agreement and covenant to live separate, and not to molest or compel to cohabit, usually contains pecuniary clauses for payment of annual sums to the wife by the husband, and *vice versâ*, and sometimes an assignment by each to the other of their respective property, and covenant by the trustees to indemnify the husband against the wife's debts.

It seems still doubtful if a separation deed is valid as against creditors, and what consideration would be required to support it.

The law as to separation deeds is the history of a development by judges of the right of married persons to live separate. But as early as the seventeenth century it was decided that articles of separation entered into between husband and wife debarred him of the right to seize her by force, or to have her brought up by *habeas corpus* with whomever she might be residing.¹

On the other hand, the Ecclesiastical Courts and the successor, the Court of Divorce, never regarded articles of separation as a bar to a suit for restitution of conjugal rights;² nor did the Court of Chancery, although habitually enforcing the rest of the deed, interfere by injunction to prevent either party suing till 1861, when Westbury, L. C., decided such deeds were lawful and not contrary to public policy, and that an injunction might be granted if either party sued contrary to the provisions of the deed;³ and since the Judicature Act they are pleadable in the Probate and Divorce Division.⁴

But an antenuptial agreement to live separate, or any agreement for future separation, is void; and a deed by

¹ *R. v. Mead* (*Mrs. Wilke's case*) (1758), 2 Kenyon, 279.

² Per Lord Stowell in *Mortimer v. M.* (1820), 2 Hag. Con., 310, p. 318.

³ *Hunt v. H.* (1861), 4 De G. F. & J., 221.

⁴ *Marshall v. M.* (1879), 5 P. D., 19.

way of facilitating divorce is contrary to public policy and void. And if the separation deed was obtained by fraud and concealment, as, *e.g.*, to enable the wife to live in adultery with the trustee, it may be set aside.

The separation deed is not a licence to commit adultery, and does not estop either party from suing for divorce on account of subsequent matrimonial offences; but it usually is a bar to damages against the correspondent (Chap. VII, ss. 2 (*f*), 3 (*c*) (*g*), 5 (*d*)). On the other hand, a subsequent divorce does not release the parties from their pecuniary obligation in the separation deeds (see Chap. XIII), although on granting a dissolution of marriage the Court can alter the deed under their power to vary settlement (see Chap. XI, s. 4). But simple adultery, either of husband or wife, therefore, does not affect the covenants of a separation deed; see *post*, pp. 427-429.

On a subsequent reconciliation it is always presumed to be the intention of the parties that the deed should be void; but such presumption may be rebutted, and if so, the Courts will uphold the deed as a post-nuptial settlement.

CHAPTER V

NULLITY OF MARRIAGE ON ACCOUNT OF IMPOTENCE¹

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¹ The author's reason for treating this subject at some length is, that it often happens that women who have been married to an impotent man do not know that they are entitled to a decree of nullity on this ground. Therefore, women frequently omit altogether to sue for nullity, or delay for a long time, until they are, by accident, informed of their rights. The truth of this statement may be easily verified from evidence in reported cases, *e.g.*, *Lewis v. Hayward* (1866), 35 L. J., P. & M., 105, and from the experience of every practitioner. It may be pointed out here, and at once, that a suit for nullity may be heard private *in camera* (see *post*, p. 213). Further, it may be added that in such suits medical evidence is frequently given that the wife's

SEC. 1.—DEFINITION, EVIDENCE, AND JURISDICTION

(a) *Grounds for Nullity*

“IMPOTENCE” was by the Canon Law a ground for declaring the marriage null and void and allowing the parties to remarry; but such a marriage was voidable, not void, the impediment being a canonical one.¹ Impotent persons can marry and be married,² and impotence of the defendant is no defence to an action for breach of promise of marriage.³ The technical canonical term was *maleficati* or *frigidi* for men, *nimis arctæ* for women,⁴ *inhabiles* for either.

In an early text-book of English ecclesiastical practice, impotence is noted as a ground for nullity;⁵ and in practice there is a long series of English reported cases, beginning in the reign of Elizabeth⁶ and James I,⁷ recognising impotence as a good cause for declaring the marriage null and void.

health is apt to suffer from cohabitation without marital intercourse; *Pollard v. Wybourn* (1828), 1 Hag. Ec., 725; *Scott v. Jones* (1842), 2 N. of C., 36; *Anon* (1857), Dea. & Sw., 295, 298; *S. v. E.* (1863), 3 Sw. & Tr., 240, 244; *F. v. D.* (1865), 4 Sw. & Tr., 86; and see the evidence of the celebrated French Dr. Brouardel, June 15, 1890, Acta S. S., vol. xxiii., pp. 156–64. Impotence as a cause of nullity is not recognised by the Code Napoleon; see Dalloz, tit. Mariage, chap. ii., sec. 2, 75.

¹ *A. v. B.* (1868), L. R., 1 P. & M., 559; Lord Penzance and *Turner v. Thompson* (1888), 13 P. D., 37, Hannen, P.; *Cavell v. Prince* (1866), L. R., 1 Ex., 246; and see *ante*, Chap. II, and *post* (c), and Chap. VI, p. 223.

² *A. v. B.*, *ubi sup.*; *Cavell v. Prince*, *ubi sup.*; and see Chap. II, p. 34.

³ *Hall v. Wright* (1858), E. B. & E., 746, Ex. Ch.; and see *post*, Chap. XII.

⁴ Decretum, pt. 2, cause 33. Decretals, bk. iv., tit. 15.

⁵ Oughton's *Ordo Judiciorum*, vol. i., tit. 93, sec. 17, tit. 217.

⁶ *Bury's case* (1561), 5 Rep., 98b; 2 St. Tr., 849, 850.

⁷ *Countess of Essex v. Earl of Essex* (1613), 2 St. Tr., 785,

Impotence is not equivalent to sterility; for neither husband nor wife has the right to complain that he fails to impregnate her, or that she is barren. Mere incapability of conception is not a sufficient ground whereon to found a decree of nullity.¹ The only question is whether or not the party is capable of marital intercourse.

As to the meaning and definition of the term "sexual intercourse," Dr. Lushington said—

"Sexual intercourse, in the ordinary meaning of the term, is ordinary and complete intercourse, it does not mean partial and imperfect intercourse; yet I cannot go the length of saying that any degree of imperfection would deprive it of its essential character."²

The impotence must be one existing at the date of the marriage, not subsequently supervening,³ but *e converso* if although the party was impotent and incapable at the time of marriage, but at the trial he or she has become capable, or there is a possibility of capacity, the decree will be refused, as the impotence is not incurable.⁴

So it will be no defence for the respondent to bring evidence to show that before the date of the marriage he

¹ *Deane v. Aveling* (1845), 1 Rob. Ec., 279; but in another case where the report stated that "the respondent was capable of imperfect sexual intercourse; that such had taken place to a considerable extent; and that consequently she was no longer a virgin, although she was undeniably incapable of conception," the Privy Council on this evidence coupled with delay refused a decree; *B—n v. B—n* (1854), 1 Ecc. & Ad., 248. Therefore, seemingly, the husband of a woman upon whom, previous to marriage, ovariectomy had been performed, could not obtain nullity, for although such a wife is absolutely sterile, yet she is capable of intercourse.

² *Deane v. Aveling* (1845), 1 Rob., 279; and for the case of a man, see Sanchez, bk. x., disp. 4, No. 13, p. 329, and the medical evidence in *Hunt v. H.* (1856), Dea. & Sw., 121, p. 129; and see Taylor's Medical Jurisprudence, vol. ii.; and compare what was and is the necessary evidence of carnal knowledge in rape, Chap. XV, s. 6, p. 480; and 9 Geo. IV, c. 31, s. 18, and 24 & 25 Vict., c. 100, s. 63.

³ *Brown v. Brown* (1828), 1 Hag. Ec., 523.

⁴ *Welde v. W.* (1731), 2 Lee, 580; and see *post*, p. 206, Incurableness.

or she was capable, if it be proved that at the time of the marriage, owing to advance of years or some other cause, the respondent has become and remains impotent, and the marriage unconsummated; for however old the respondent be, even if, *e.g.*, a wife over child-bearing, aged forty-nine, the petitioner has a right to a decree.¹

Neither, though in this respect the Court will proceed cautiously, is it sufficient disproving evidence for the respondent to show that before or even during the marriage he had had sexual intercourse with other persons, if the petitioner shows that the marriage after a triennial cohabitation remains non-consummate, for a man may be impotent towards his wife *impotens quoad hanc*.²

Incurability.—Lastly, the impotence must be incurable; ³ and so where the respondent husband was suffering from temporary incapacity, and the doctors reported he would become capable on permanently altering his mode of life, the decree was refused.⁴

If the impediment, although not actually incurable, can only be cured by a surgical operation involving considerable danger to life, and of doubtful success, the Court will not force on the respondent such an operation, but grant a nullity.⁵

If the operation necessary to cure the impotence is one of great risk, the petitioner need not call upon the respond-

¹ *Williams v. Homfray* (1861), 2 Sw. & Tr., 240, overruling dicta in *Brown v. B.*, *ubi sup.*; and *Briggs v. Morgan* (1820), 2 Hag. Con., 324.

² *Countess of Essex v. Earl of Essex* (1613), 2 St. Tr., 785; *A. v. B.* (1853), 1 Spinks, Ec. & Ad., 12; *s. c. sub non N—r v. M—c*, 2 Rob. Ec., 625.

³ Oughton, vol. i., tit. 217, sec. 3; *Brown v. B.* (1828), 1 Hag. Ec., 523.

⁴ Cf. *S. v. E.* (1863), 3 Sw. & Tr., 240; but in this case the cohabitation was only for two months, there was no visible defect in the respondent, and the petitioner's virginity was doubtful; but self-abuse often produces permanent incapacity, and has been the foundation of a decree for nullity. ⁵ *Williams v. Homfray* (1861), 2 Sw. & Tr., 240.

ent to submit to it; if the operation is one involving no great risk to life, the petitioner should do all he or she can to persuade the respondent to submit to it;¹ but in no case can the Court compel the respondent to submit to it.²

Obstinate refusal to consummate.—There remains the case where one party has resisted the efforts of the other party to consummate the marriage, such other party being ready and willing, and endeavouring to have sexual intercourse.

And as to this, it has been laid down by Lord Hannen that

“A wilful, wrongful refusal of sexual intercourse is not in itself sufficient to justify the Court in declaring a marriage to be null by reason of impotence. However much we may recoil from the idea of a man using force to compel his wife to have intercourse with him,—and such a feeling is one which is probably much stronger at the present day than in past times,—no case has gone the length of saying because a man naturally abstains from using force, that therefore the refusal, if it be merely a wilful refusal on the part of the wife, will justify him in coming to the Court and asking that it shall be declared that the marriage is void. Recent cases only establish this in advance of previous decisions, viz., that where a woman is shown not to have had intercourse with her husband after a reasonable time for consummation of the marriage, if it appears that she has abstained from intercourse and resisted her husband's attempts, the Court will draw the inference that that refusal on her part arises from incapacity.”³

In a case where the petitioning husband was at the time of the marriage a widower with several children, and the evidence established beyond all question his capacity for marital intercourse, but after two years and ten months' cohabitation the marriage remained uncon-

¹ *L. v. W.* (1882), 7 P. D., 16.

² *L. v. W.*, *ubi sup.*; *Williams v. Homfray*, *ubi sup.*

³ *S. v. A.* (1878), 3 P. D., 72; but in a previous case, *H. v. P.* (1873), L. R., 3 P. & M., 126, Hannen himself, then J. O., and in an earlier case, *G. v. G.* (1871), L. R., 2 P. & M., 287, Lord Penzance, J. O., pronounced against a husband by mere brute force compelling his wife to submit to sexual intercourse.

suminated, owing to the respondent's resistance, the doctor's evidence was that although there was no physical structural defect in the respondent, yet that her condition, which was partly hysterical and partly owing to her refusal to take remedies, rendered consummation practically impossible, the Court granted a decree of nullity.¹

(b) *Evidence*

Onus of Proof.—In a suit for declaration of nullity by reason of alleged impotence, the onus of proof is on the complainant.² The petitioner accepts the burden of proving two propositions—first, that the marriage has never been consummated; and secondly, that it has failed to be so in consequence of the incurable incompetence of her husband.³ If the wife is the petitioner (and suits by wives are more numerous than suits by husbands), the best evidence of non-consummation is that which proves her to be *virgo intacta*.

But even if the wife is not *virgo intacta*, as, for instance where she was a widow at the date of the marriage, or even if she has committed what, if the marriage were valid, would be adultery, she may, on proving non-consummation, obtain a decree.⁴

If the husband is the petitioner, he should tender

¹ *G. v. G.* (1871), L. R., 2 P. & M., 287; and see *P. v. L.* (1873), 3 P. D., 73*n*, where the respondent resisted intercourse, fled from her husband, refused to take remedies or submit to intercourse, saying it was "like the beasts of the field," and a decree of nullity was granted; see also *H. v. P.* (1873), L. R., 3 P. & M., 126. The details of these cases are unsuitable for insertion here at length.

² *Cuno v. C.* (1873), L. R., 2 H. L., Sc. & D., 300.

³ Per Lord Penzance, *U. v. J.* (1867), L. R., 1 P. & M., 460.

⁴ *G. v. M.* (1885), 10 App. Ca., 171; *M. f. c.*, *D. v. D.* (1885), 10 P. D., 75; and see *Serrell v. S.* (1862), 2 Sw. & Tr., 422; and see also *Sparrow v. Harrison* (1841), 3 Curt., 16; 4 Moore P. C., 96; *G.-s. f. c.*, *T—e v. T—e* (1854), 1 Spinks, Sc. & Ad., 389; *F. f. c.*, *D. v. D.* (1865), 4 Sw. & Tr., 86.

himself for inspection, and give evidence of non-consummation, and ask that the respondent wife should be inspected. It is also usually given in evidence that the petitioning husband has complained of the wife to her relations, and returned her to them; see *post*, pp. 234, 278.

Triennial Cohabitation.—After triennial cohabitation, when virginity and aptness is pleaded, the onus is thrown on the respondent either of disproving the facts or of showing by clear and satisfactory evidence that the result was attributable to other causes than his own impotency.¹

When non-consummation is proved after triennial cohabitation, a presumption of impotence is raised, but that presumption is rebuttable.²

Triennial cohabitation is usually necessary where there is no visible defect or incapacity;³ but the rule is not a hard and fast rule, and when sufficient time has elapsed to allow any temporary obstacle, such as nervous feeling on the part of the man, or resistance from fear on the part of the woman, to be overcome, a decree will be given, though no visible defect be proved against the respondent, if the petitioner be *virgo intacta*.⁴

But the converse rule is a strict one, viz.—

“After triennial cohabitation without consummation the law presumes impotency though no defect be apparent, whether impotency *quoad hanc* or universally.”⁵

¹ *Lewis v. Hayward* (1866), 35 L. J., P. & M., 105.

² *G. v. M.* (1885), 10 App. Ca., 171.

³ *Welde v. W.* (1731), 2 Lee, 580; Oughton, tit. 217; *Scott v. Jones* (1842), 2 N. of C., 36; *M. f. c., H. v. H.* (1864), 3 Sw. & Tr., 517.

⁴ Per Dr. Lushington in *U—n v. F—s* (1853), 2 Rob. Ec., 614. Here the cohabitation was for two years and ten months, the virginity and aptness of the wife was proved, and the husband refused inspection; *N—r. f. c., M. v. M.* (1883), 2 Rob. Ec., 625, s. c. *sub non A. f., B. v. B.*, 1 Spinks, Ecc. & Ad., 12, where there was twenty-one months' cohabitation.

⁵ *N—r. f. c., M—e*, s. c. *sub non A. f. s., B. v. B., ubi sup.*

And in a recent case in the House of Lords, Lord Selborne, L. C. (and the rest of the House agreed with the Chancellor), approved the decision of Dr. Lushington, and it was laid down that where a husband or a wife seeks a decree of nullity *propter impotentiam*, if there is no more evidence than that they have for a period of three years lived together in the same house with ordinary opportunities of intercourse, and it is clearly proved that there has been no consummation, then, if that is the whole state of the evidence, inability on the part of one or other will be presumed; on the other hand, the presumption to be drawn from the fact of non-consummation is capable of being rebutted, and also every case need not be fortified with the presumption; for although no presumption can be raised from the absence of consummation within a less period than three years, yet positive evidence may be given from which the sure inference of inability may be drawn.¹

The rule as to triennial cohabitation only applies when the impotence is left to be presumed from continued non-consummation, for when the impotence is clearly proved *aliunde*, the Court has never had recourse to it.² If there is a visible incapacity, it is the duty of a petitioner to move promptly; and in one case Lord Stowell commented strongly on a delay of sixteen months;³ see *post* as to delay, p. 218.

Inspection.—The best evidence arises from inspection.⁴ In some foreign Courts they were wont to have a solemn inspection visitation performed by surgeons in presence of the judges and parties, and formerly in France they

¹ *G. v. M.* (1885), 10 App. Ca., 176.

² *F. f. c.*, *D. v. D.* (1865), 4 Sw. & Tr., 86; *B. v. B.* (1875), 1 R. 9 Eq., 551.

³ *Briggs v. Morgan* (1820), 3 Phillim., 325.

⁴ *Welde v. W.* (1731), 2 Lee, 580.

used "the congressus"; but that method was abolished by the Parliament of Paris in the year 1665.

The Court usually requires medical evidence as to the physical condition of the parties, and it is the duty of the petitioner to apply to the Court to have sworn medical inspectors appointed who examine both parties.¹ If the respondent refuses to be inspected he will not be compelled, but it will be taken strongly against him or her, and the impotence presumed.²

Confessions.—Confession by itself is not sufficient or satisfactory;³ but this, coupled with a refusal to undergo inspection, is strong evidence against a respondent.⁴

But oral information given by the respondent to the inspectors on which they base their report, although there is no visible defect, will be sufficient to enable the Court to find the respondent actually impotent without the necessity of triennial cohabitation.⁵

(c) *Jurisdiction and Procedure*

Old Ecclesiastical Law.—The suit for nullity on the ground of impotence being canonical, was always exclusively cognisable in the Ecclesiastical Courts.⁶

¹ *H. v. C.* (1860), 29 L. J., P. & M., 81, and cases there cited; and see forms issued under authority of the Court, Nos. 54, 55, 56, and 57, given at length, Dixon on Divorce, 2nd ed., pp. 604–606.

² *Pollard v. Wybourn* (1828), 1 Hag. Ec., 725; *Sparrow v. Harrison* (1841), 4 Moore P. C., 96; *F. f. c., D. v. D.* (1865), 4 Sw. & Tr., 86; *B. v. L.* (1869), L. R., 1 P. & M., 639; *H. v. P.* (1873), L. R., 3 P. & M., 126. The case of *T. v. M.* (1865), L. R., 1 P. & M., 31, seems unique, and not to have been followed; but see *B. alias A. v. B.* (1891), 27 L. R. Ir., 587.

³ Canon 105; *Welde v. W.* (1731), 2 Lee, 580, see 585; and see as to Confessions, Chap. VII, s. 5 (a).

⁴ *Pollard v. Wybourn* (1828), 1 Hag. Ec., 725; *Sparrow v. Harrison* (1841), 4 Moore, P. C., 96.

⁵ *Greenstreet v. Cumyns* (1812), 2 Phillim., 10; *G—s v. T—e* (1859), 1 Spinks, Ecc. & Ad., 389.

⁶ See Oughton, tit. cxiii., sec. xvii., tit. ccxvii.; Clarke's Praxis, tits.

“The question of impotence as a ground of nullity has never yet been raised in the Temporal Courts of this country. The various restrictions on marriage, such as a prior existing marriage, insanity, illegality under the Marriage Acts, illegality under the Royal Marriage Act, and, since Lord Lyndhurst’s Act, consanguinity or affinity, all these matters, when they arise incidentally in the Temporal Courts, have in modern times been there dealt with for the purpose of the suit in which they have arisen. . . . How then, it may be asked, does it happen that the particular ground which is raised incidentally in this suit has not followed the fate of all other grounds of nullity and become cognisable in the Temporal Courts? The answer is, that impotence does not render a marriage ‘void,’ but only ‘voidable.’”¹

And it was thereby laid down that a marriage cannot be impeached on the ground of impotence after the death of one of the parties.²

So where, to an action on a covenant made by the defendant in consideration of his daughter’s marriage, the defendant pleaded that the marriage was null and void by reason of the impotence of the husband, without stating that it had been avoided by the sentence of any Court, or that either of the parties had elected to treat it as void, the Court of Exchequer held it a bad plea.³

Under Matrimonial Causes Act, 1857.—By the Matrimonial Causes Act, 1857, all jurisdiction then exercised by any Ecclesiastical Court in England in suits of nullity of marriage were abolished and transferred to Her Majesty, to be exercised by “the Court for Divorce and Matrimonial Causes.”⁴

cvii. and cxii.; the Clerk’s Instructor, chap. iv., p. 331, and other books of ecclesiastical procedure; and see account of Ecclesiastical Courts and Commissions of 1831, 1832, and 1883; and see *ante*, pp. 1–9.

¹ Per Sir J. P. Wilde, afterwards Lord Penzance, *A. v. B.* (1868), L. R., 1 P. & M., 559; and see Chap. VI, p. 222, as to other suits for nullity, and also Chap. II, p. 34; as to such a marriage being voidable only, and not void, see per Hannen, P., now Lord Hannen, *Turner v. Thompson* (1888), 13 P. D., 37; and *Cavell v. Prince* (1866), L. R., 1 Ex., 246.

² *A. v. B.*, *ubi sup.*

³ *Cavell v. Prince*, *ubi sup.*

⁴ 20 & 21 Vict., c. 85, ss. 2 and 6. By the Judicature Act, 1873, 36 &

But in suits for nullity the Court is to

“Proceed, act, and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under the Act.”¹

Generally in suits for dissolution the procedure as to evidence, and as to the verifying affidavit by the petitioner, is the same as in suits for dissolutions; see *post*, Chap. VII, s. 1 (e), s. 5 (a).

Hearing in Camerâ.—An important difference between the procedure in suits for dissolution and suits for nullity is, that in virtue of the section quoted *supra*, a suit for nullity can be heard *in camerâ* privately, whereas a suit for dissolution must be heard in open Court.²

Decree Nisi.—By the Matrimonial Causes Act, 1873, decrees for nullity are to be *nisi* in the first instance, and only to be made absolute after six months, during which there can be intervention to show collusion, or that material evidence has been brought before the Court;³ and the Court will not shorten this period of six months except under very special circumstances.⁴ The respondent cannot apply for a decree *nisi* to be made

37 Vict., c. 66, ss. 16 (7), 31, 34, the jurisdiction of the Court for Divorce and Matrimonial Causes was vested in the High Court of Justice to be exercised by the Probate, Divorce, and Admiralty Division. The rules of the Supreme Court do not apply to divorce proceedings, see *Redfern v. R.* (1891), P., 139, but are under its own old rules; see Dixon on Divorce, 2nd ed., App. B. & D.; and see *post*, Chap. VII, s. 1 (b).

¹ *Ib.*, s. 22; *Andrews v. Ross* (1888), p. 14, P. D., 15; for form of petition, see Dixon on Divorce, 2nd ed., p. 184; for form of citation of respondent, see pp. 205, 210.

² *C. v. C.* (1869), L. R., 1 P. & M., 640; *A. v. A.* (1875), L. R., 3 P. & M., 230, 232, n.; and see *post*, Chap. VII, s. 1 (e), Chap. VIII, s. 1 (c); *B. v. B.* (1875), I. R., 9 Eq., 551.

³ 36 Vict., c. 31; see Chap. VII, s. 1 (e), 2 (g), 3 (f).

⁴ *M. v. B.* (1874), L. R., 3 P. & M., 200; as to intervention by the Queen's Proctor, see *post*, Chap. VII, s. 2 (g).

absolute,¹ and even the petitioner has no absolute unconditional right to have the decree made absolute.²

Alimony.—There is power to grant alimony *pendente lite* in a suit for nullity on the ground of impotence, which continues until the decree for nullity is made absolute.³

Variation of Settlements.—The Court has power, after a final decree of nullity of marriage, to inquire into the existence of antenuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or their respective parents as the Court may seem fit.⁴ As to the exercise of this power, see generally Chap. XI, s. 4.

In the only reported case of a variation of settlements on a decree of nullity for impotence the Court ordered the whole of the property of the alleged wife (the petitioner) to be reconveyed to her freed from the trusts of the settlement upon the alleged marriage.⁵

Interrogatories and Discovery.—Interrogatories may be administered and discovery enforced in a suit for nullity.⁶

(d) *Who can sue*

The Party injured.—This suit for nullity is purely a personal action, and can only be instituted by the parties

¹ *Halfen v. Boddington* (1881), 6 P. D., 13.

² *Langworthy v. L.* (1886), 11 P. D., 85, C. A.; and see Chap. VII, s. 2 (g).

³ *S. v. B.* (1884), 9 P. D., 80; and see above as to decree absolute; and see *post*, Chap. XI, s. 1.

⁴ 22 & 23 Vict. c. 61, s. 5; but this does not give the Court jurisdiction if the nullity has been pronounced by a foreign or colonial Court. *Moore v. Bull* (1891), P., 279.

⁵ *A. v. M.* (1884), 10 P. D., 178.

⁶ *Euston v. Smith* (1884), 9 P. D., 57; *Harvey v. Lovelkin* (1884), 10 P. D., 122; *Redfern v. R.* (1891), P., 139, C. A.

to the marriage, and not by third persons. It has been before explained that impotence only makes a marriage "voidable" and not "void," and in that case Lord Penzance said—

"The distinction between 'void' and 'voidable' is not a mere refinement, but expresses a real difference in substance. The real difference is well known and perfectly recognised at Common Law in regard to many contracts, in respect of which it is held that the injured party may treat the contract as void or not at his option. . . . Now it is obvious enough that this matter of impotence is one which ought to be raised only by the party who suffers an injury from it, and who elects to make it a ground for asking that the contract of marriage should be annulled. For although it has been said that the procreation of children is the one main object of marriage, yet it cannot be doubted that marriages between persons so advanced in years as effectually and certainly to defeat that object, are perfectly legal and binding. The truth is, *consensus non concubitus facit matrimonium*. In all cases in which the incapacity to marriage is one in which society has an interest, and which rests on grounds of public policy, it would be wrong and illogical that validity or invalidity upon the option of the parties, and in all such cases the marriage is absolutely 'void' and not 'voidable' only (as to this see *ante*, p. 212, and *post*, Chap. VI, pp. 223, 224). But impotence has always hitherto been considered in the Ecclesiastical Courts (and since their abolition, in the Divorce and Matrimonial Court) as a matter of personal complaint only. . . . I must here take leave to point out that a contrary system would give rise to some almost intolerable results. The question whether two people are married or not may arise on a great variety of occasions and be raised by third persons, as creditors or otherwise. Now, if the parties themselves in a case of impotence are content with the *consortium vite*, and prefer to maintain the bond of matrimony intact, would it not be almost intolerable that a third person should have the right to insist upon an inquiry into the nature of their cohabitation and the revelation of their physical defects? . . . This much is clear, that the practice of the Courts, both temporal and spiritual, from all time has been inconsistent with the attempt now made, and that it is not supported by a single authority."¹

¹ *A. v. B.* (1868), L. R., 1 P. & M., 559; and see *Cavell v. Prince* (1866), L. R., 1 Ex., 246, quoted at more length, *ante*, p. 212. However, in a petition for a dissolution, a *bond fide* belief by the parties that the marriage was invalid on the ground of impotence was taken into consideration by the Court; *Ousey v. O.* (1874), L. R., 3 P. & M., 223; and see this case discussed in Chap. VII, pp. 261, 348, 349.

So a marriage cannot be impeached on the ground of impotence after the death of one of the parties.¹

In the case above cited, which was an administration suit, the plaintiff claimed the grant as the husband of the intestate, and the defendants, the intestate's mother and brother, claimed administration as next of kin to the intestate on the ground that although she died married to the plaintiff for fourteen years, yet that the marriage was in truth void on account of the plaintiff's impotence. This was a great novelty, being an attempt to question a marriage as void on the ground of impotence after the death of one of the parties, and that too in a collateral matter arising in the Probate Court. The Court granted administration to the husband, and pronounced the contention of the defendants to have wholly failed for the reasons above quoted.²

Impotent Spouse cannot sue.—A party is not allowed to set up his own incapacity and to petition for nullity, alleging himself impotent;³ and a respondent against whom a decree *nisi* for nullity on account of impotence has been made cannot apply to have it made absolute.⁴

(e) *If the Court is deceived*

It has happened that after a marriage has been decreed void for impotence, it turns out that the Court has been deceived, as appears by the fact of the person so declared impotent becoming the father or mother of children.⁵

¹ *A. v. B.*, *ubi sup.*

² *A. v. B.* (1868), L. R., 1 P. & M., 559; and see *Cavell v. Prince* (1866), L. R., 1 Ex., 246.

³ *Norton v. Seton* (1819), 3 Phillim., 147; but see *A. v. B.* (1887), L. R. Ir., 403, C. A.

⁴ *Halfen v. Boddington* (1881), 6 P. D., 13; and see *Langworthy v. L.* (1886), 11 P. D., 85, C. A., as to petitioner's right to a decree absolute.

⁵ *Bury's case* (1598), 5 Rep., 98b, 2 St. Tr., 849, 850n, 2 Dy., 179a; *U—n v. F—s* (1853), 2 Rob. Ec., 614, to which case there is in the

In this case it appears by Canon Law that the second marriage must be set aside, and the first marriage declared valid;¹ but at Common Law it was decided that, admitting the second marriage was voidable, yet it remains a marriage until it is dissolved; and by consequence the issue born during the coverture, if no divorce be obtained in the life of the parties, is lawful.²

But in a later case Dr. Lushington declared—

“The Court will not adopt the doctrine of the nullity of such second marriage by reason of the Church having being deceived.”³

SEC. 2.—BARS TO SUIT

(a) *Generally*

It is open to the respondent to defend, either by denying that any marriage at all was celebrated between them, or further denying the alleged malformation.⁴ But it seems very doubtful whether any other defence is admissible, and the more recent cases go to prove that the defendant cannot set up that the petitioner was barred *exceptione personali*. What had at one time been considered bars are considered below.

(b) *Delay*

Delay in itself is not a bar to the suit, but it seems that if a very long time elapse, the evidence to prove the

copy of the report, in the Inner Temple Library, a pencil note to the effect that each of the parties married again, and each had a family, 619*n*.

¹ Per Dr. Bettesworth in *Welde v. W.* (1731), 2 Lee, 580, the judge citing *Corpus Juris Canonici Decretals*, bk. iv., tit. 15; and see *post*, Chap. XVI.

² *Bury's* case, *ubi sup.*; and see pp. 33, 34, 129–133.

³ *A. v. B.* (1853), 1 Spinks, Ecc. & Ad., 12, p. 14.

⁴ See Dixon on Divorce, 2nd ed., p. 127.

impotence should be very strong.¹ Therefore, when there was twenty-four years' delay, the House of Lords, basing their decision on this, as well as a lack of the fullest proof and lack of sincerity (as to which see *post*, p. 219), refused a decree.² And in a case where there was seventeen years' delay unaccounted for, with some defect of proof and insincerity (see *post*, p. 219), the Privy Council, reversing the Court of Arches, refused a decree.³

Where there was delay of sixteen years, the House of Lords held it to be accounted for by the petitioning wife's ignorance of her remedy.⁴ In another case the delay was excused where the petitioner had hoped that the respondent would become cured.⁵

Where the impotence is undoubted, mere delay is not sufficient to disentitle the petitioner to relief ;⁶ but where there is a conflict of evidence, delay is material, as throwing discredit on the petitioner's story.⁷

(c) *Insincerity*

"Insincerity" as a bar appears to have been a principle originated by Lord Stowell, by whom and by his successors it seems to have been defined as "combination of circumstances, which show that the alleged grievance was not the motive which led to the commencement of the

¹ *Castleden v. C.* (1861), 9 H. L. C., 186 ; *Cuno v. C.* (1873), L. R., 2 H. L. Sc., 300.

² *Castleden v. C.*, *ubi sup.* ; but see observations of Lord Bramwell on this decision in *G. v. M.* (1885), 10 App. Ca., 176, p. 204.

³ *B—n v. B—n* (1854), 1 Spinks, Ecc. & Ad., 248.

⁴ *Lewis v. Hayward* (1866), 35 L. J., P. & M., 105.

⁵ *E. v. T.* (1863), 3 Sw. & Tr., 312.

⁶ *M. alias D. v. D.* (1885), 10 P. D., 75 ; and see H. L. case, *G. v. M.*, *ubi sup.*, *Cuno v. C.*, *ubi sup.*, decided the same year ; and see per Lord Chelmsford, L. C., in *Lewis v. Haywood*, *ubi sup.*, *Quod ab initio non valet in tractu temporis non convalescit.*

⁷ *S. v. A.* (1878), 3 P. D., 72 ; and see *B. alias A. v. B.* (1891), 27 L. R., 587.

suit,"¹ or a "mixture of subsidiary motive." But in a recent case in the House of Lords, Lord Selborne, L. C., and Lord Bramwell declined to recognise the existence of any such principle of so recent an origin, except as far as it might rest on a basis of substantial justice, so as to render it unfair that the petitioner, after having approbated the marriage by taking substantial benefits under it, should then sue for its annulment; and in such a case only *might* the petitioner be held barred.²

But where a husband was respondent to a suit for divorce on account of adultery, in which suit he might have raised the question of the validity of the marriage, but did not, and a divorce *a mensa et thoro* was pronounced against him, he was held estopped from instituting a suit for nullity on account of the wife's impotence.³

(d) Age

That the parties married at an advanced age, even in the case of the woman beyond the period for child-bearing, as, for instance, where the wife was aged forty-nine at the date of marriage, is no bar to a suit if the petitioner can prove the respondent's incapacity.⁴

(e) Matrimonial Offences

Misconduct on the part of the petitioner is no bar to the suit; and see *post*, p. 233.

Adultery.—If the petitioner has been guilty of adultery⁵

¹ Per Dr. Lushington in *Anon* (1857), 1 Dea. & Sw., 295, p. 300.

² *G. v. M.* (1885), 10 App. Ca., 176.

³ *Guest v. Shipley* (1820), 2 Hag. Con., 321; and for converse case, see *Ditchfield v. D.* (1869), L. R., 1 P. & M., 729; *infra*, pp. 220, 286.

⁴ *Williams v. Homfray* (1861), 2 Sw. & Tr., 240; 6 Jur., N. S., 151; and see *ante*, pp. 205, 206.

⁵ *Anon* (1887), 1 Dea. and Sw., 295; *Taverner*, f. c., *Ditchford v. D.* (1864), 33 L. J., P. & M., 105; *G. v. M.* (1885), 10 App. Ca., 176; *M. v. D.* (1885), 10 P. D., 75.

or cruelty,¹ this will not bar him or her from suing for a decree. A plea alleging adultery or cruelty will be struck out, even if the petition was originally for judicial separation or dissolution of marriage on account of cruelty or adultery or both. If the respondent sets up that the marriage was null on account of impotence, the question of nullity will be tried first before that of adultery is gone into.²

Cruelty.—Neither can a plea of cruelty be added by the petitioner in a petition for nullity, except in so far as it may tend to show why there was no further cohabitation;³ but the fact that the petitioning wife has failed in a suit for nullity will not bar or estop her from subsequently instituting a suit for dissolution of marriage on the ground of the husband's adultery and cruelty.⁴

Bigamy.—Nor will an intervening marriage subsequent to the alleged voidable marriage, and previous to the institution of the suit for nullity, bar the suit.⁵

(f) *Agreement not to sue*

Lastly, when a separation deed between husband and wife contains the common agreement not to sue or molest each other, the petition will be barred.⁶

¹ *Williams v. Homfray* (1860), 6 Jur., N. S., 151; 2 Sw. & Tr., 240.

² *G. v. M.*, *ubi sup.*; *Anon.*, *ubi sup.*; but the petitioner in the nullity suit may be cross-examined as to her improper intimacy with the co-respondent in the cross suit; *M. v. D.* (1885), 10 P. D., 75; and see *Mayhew v. M.* (1812), 2 Phillim., 11.

³ *G—s v. T—e* (1854), 1 Spinks, Ecc. & Ad., 389.

⁴ *Ditchfield v. D.* (1869), L. R., 1 P. & M., 729.

⁵ *B. alias, A. v. B.* (1891), 27 L. R. Ir., 587; such marriage would probably be validated by the retrospective effect of the decree; see *ante*, p. 34.

⁶ *Aldridge v. A.* (1888), 13 P. D., 210.

CHAPTER VI

NULLITY OF MARRIAGE (EXCEPT ON ACCOUNT OF IMPOTENCE)¹

<p>1. Grounds of Nullity and Procedure, . . . 221</p> <p>(a) <i>Causes of Action</i>, . . . 221</p> <p>(b) <i>Suit for Nullity</i>, . . . 223</p> <p style="padding-left: 2em;"><i>Original Jurisdiction</i>, 223</p> <p style="padding-left: 2em;"><i>Declaratory Sentence</i>, . 224</p> <p style="padding-left: 2em;"><i>Under Matrimonial Causes Act, 1857</i>, . 225</p> <p>(c) <i>Legitimacy Declaration Act, 1858</i>, . . . 225</p> <p>(d) <i>Nullity as a Defence</i>, 226</p> <p style="padding-left: 2em;"><i>In Dissolution or Judicial Separation</i>, . . 226</p> <p style="padding-left: 2em;"><i>In Restitution of Conjugal Rights</i>, . . . 227</p> <p style="padding-left: 2em;"><i>In Jactitation</i>, . . . 227</p> <p>(e) <i>Other Actions</i>, . . . 228</p> <p>2. Who can sue, . . . 228</p> <p>(a) <i>Generally</i>, . . . 228</p> <p>(b) <i>Parties to the Marriage</i>, . . . 228</p>	<p>(c) <i>Parents</i>, . . . 229</p> <p>(d) <i>Guardians</i>, . . . 230</p> <p>(e) <i>Committee of a Lunatic</i>, 230</p> <p>(f) <i>Other Persons</i>, . . . 231</p> <p style="padding-left: 2em;"><i>Remainder Men</i>, . . . 231</p> <p style="padding-left: 2em;"><i>Churchwardens</i>, . . . 231</p> <p style="padding-left: 2em;"><i>Sovereign</i>, . . . 232</p> <p>(g) <i>Interveners</i>, . . . 232</p> <p>3. Estoppel, . . . 232</p> <p>(a) <i>Generally</i>, . . . 232</p> <p>(b) <i>By Delay or Misconduct</i>, . . . 233</p> <p style="padding-left: 2em;"><i>Duty to Separate</i>, . . 234</p> <p>(c) <i>By Judgment</i>, . . . 234</p> <p>4. Incidents of the Suit, . . 235</p> <p>(a) <i>Generally</i>, . . . 235</p> <p>(b) <i>Alimony</i>, . . . 235</p> <p>(c) <i>Custody of Children</i>, . . 236</p> <p>(d) <i>Variation of Settlements</i>, . . . 236</p> <p>(e) <i>Interrogatories</i>, . . . 236</p>
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SEC. 1.—GROUNDS FOR NULLITY AND PROCEDURE

(a) *The Cause of Action*

The civil disabilities of prior existing marriage, nonage, lack of essential requirements of form, and since the

¹ And see *ante*, Chap. II, p. 20, Validity of Marriage, and Chap. III, p. 123, Proof of Marriage; as to procedure in petitions for nullity, see Dixon on Divorce, 2nd ed.

Marriage Act, 1835, 5 & 6 Will. IV, c. 54, relationship (see *ante*, p. 30, and Chap. II, Validity of Marriage), makes a marriage void even without sentence, and the sentence of the Court is only declaratory; canonical disability only makes the marriage voidable, and till avoided it is good.¹ The present only canonical disability is impotence (see *ante*, Chap. V, p. 203); affinity used previous to 5 & 6 Will. IV, c. 54, to be a canonical disability only making the marriage voidable.²

Force renders, it would seem, a marriage, not void, but voidable; free cohabitation would ratify and act as estoppel; see *ante*, pp. 23–28.

And Sir J. P. Wilde, J. O., now Lord Penzance, laid down—

“In all cases in which the incapacity to marriage is one in which society has an interest, and which rests on grounds of public policy, it would be wrong and illogical that the validity or invalidity should depend on the options of the parties, and in all such cases the marriage is absolutely ‘void’ and not ‘voidable.’”³

And Sir Edward Coke wrote—

“And it is further to be understood, that many divorces that were of force by the Canon Law when Lyttleton wrote, are not in force at this day; for by the statute of 32 Hen. VIII, c. 38, it is declared that persons be lawful (that is, may lawfully marry) that be not prohibited by God’s law to marry, that is to say, that be not prohibited by Levitical degrees.”⁴

¹ See Shelford on Marriage and Divorce, pp. 479–85; and see per Sir John Nicholl in *Elliott v. Gurr* (1812), 2 Phillim, 16, p. 19, as to distinction between Statutory or Common Law nullity on the one hand and nullity for impotence on the other; see per Dr. Lushington, *Miles v. Chilton* (1849), 6 N. of C., 636, p. 647; and *Kenn’s case* (1607), 7 Rep., 42b, 44b, n. (e); *R. v. Preston* (1759), 1 W. Bl., 192; *ex parte Turing* (1812), 1 V. & B., 140.

² See *infra*, and Chap. V, Nullity for Impotence, p. 203; and see also, Chap. I, pp. 10, 11, and Chap. II, p. 30.

³ *A. v. B.* (1868), L. R., 1 P. & M., 559; and see quoted *post*, 223.

⁴ Co. Lit., 235a, cited *Wing v. Tayler* (1861), 2 Sw. & Tr., 278; as to prohibited degrees, see Chap. II, p. 30.

(b) Suit for Nullity

Original Jurisdiction.—The suit for nullity was one belonging to the old jurisdiction of the Ecclesiastical Courts. They had thereby cognisance of all disabilities, statutory¹ and civil as well as canonical.

And Sir J. P. Wilde, J. O., now Lord Penzance, laid down—

“The various restrictions on marriage, such as a prior existing marriage, insanity, illegality under the Marriage Acts, illegality under the Royal Marriage Act, and, since Lord Lyndhurst’s Act, consanguinity or affinity, all these matters, when they arise incidentally in the Temporal Courts, have in modern times been dealt with for the purpose of the suit in which they have arisen. In older times all questions of marriage were relegated to the ecclesiastical authorities. Upon the plea of *ne unque accouple* in an action for dower, the validity of the controverted marriage was always to be determined by the bishop’s certificate. The gradual declension of spiritual authority in matters temporal has brought it about that all questions as to the intrinsic validity of a marriage, if arising collaterally in a suit instituted for other objects, are determined in any of the Temporal Courts in which they may chance to arise (*aliter* as to impotence, see *ante*, p. 212). *Though at the same time a suit for the purpose of obtaining a definite decree declaring a marriage void which should be universally binding, and which should ascertain and determine the status of the parties once for all, has from all time up to the present been maintainable in the Ecclesiastical Courts or the Divorce Court alone.*”²

The Court in suits for nullity has jurisdiction to consider the marriage of English subjects wherever celebrated,³ and also over the marriages of foreigners

¹ Clarke’s Praxis, tit. cvii.; the Clerk’s Instructor in the Ecclesiastical Courts, chap. iv., pp. 332–68; Oughton, tit. exciii. The first case of statutory nullity under Lord Hardwick’s Act was *Shaw v. Page*, cited 1 Hag. Con., 213; and see per Dr. Lushington, *Miles v. Chilton* (1849), 6 N. of C., 636, p. 647.

² *A. v. B.* (1868), L. R., 1 P. & M., 559; and see *ante*, Chap. I, p. 1–9, Chap. II, *passim*, and Chap. III, Proof of Marriage, s. 1 (a), and 2 (c), pp. 123–129.

³ *Harford v. Morris* (1776), 2 Hag. Con., 423, p. 425; *Lawford v. Davies* (1877), 4 P. D., 61; *Bonaparte v. B.* (1892), Times, Aug. 1, p. 9; Aug. 2, p. 10.

if celebrated in England.¹ As to validity of a foreign sentence of nullity and divorce, see *post*, Chap. XVII.

Declaratory Sentence.—Though the sentence of nullity is an informal one, yet it is as of right, and the Court has no discretion in the matter.

“Every person interested who thinks there is a legal defect may apply, and has a right to a declaratory sentence if his application is well founded. It may be necessary for the convenience and happiness of families and of the public likewise, that the real character of these domestic connections should be ascertained and known.”²

And in another case Lord Stowell observed in a case of statutory nullity—

“It is the interest of both parties that the suit should proceed, in order that they may know the exact legal relation in which they stand to each other. The Marriage Act³ declares marriages in such cases to be *ipso facto* void,—the sentence of the Ecclesiastical Court is declaratory only, it does not make them void. If, then, I should dismiss the suit, it would not legalise the marriage, but the marriage might be questioned upon a claim of the wife’s, in any future transaction, in any Court where such claim was made.”⁴

And again, Sir J. Nicholl, in a case of statutory nullity, observed—

“Though the parties did intend to contract a valid marriage, yet either of them has the right to the benefit of a declaratory sentence. No such sentence is necessary ; but it is a matter of convenience to the parties that it should be given ; and it is a duty this Court owes to the public to declare the situation of the parties.”⁵

But in a recent case the Court declined, although the petitioner’s case was fully proved, to make absolute a

¹ *Simonin v. Mallac* (1860), 2 Sw. & Tr., 67.

² Per Lord Stowell in *Pertreus v. Tondear* (1790), 1 Hag. Con., 136 ; and see *post*, s. 3.

³ Lord Hardwicke’s Act, 26 Geo. II, c. 33.

⁴ *Bowzer v. Ricketts* (1795), 1 Hag. Con., 213.

⁵ *Hayes v. Watts* (1819), 3 Phillim., 43 ; and see *Andrews v. Ross* (1888), 14 P. D., 15 ; and see *post*, p. 232, s. 3, Estoppel.

declaratory decree *nisi* of nullity, until certain conditions were fulfilled by petitioner.¹ And before pronouncing its decree of nullity, the Court has a duty to see that the alleged marriage is proved.²

Under Matrimonial Causes Act, 1857.—Petitions for nullity are now assigned to the Probate and Divorce Division, and heard in a similar way to a petition for dissolution; but the Matrimonial Causes Act, 1857, provides that as to these nullity suits the Court shall “proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief;”³ and by a later Act the procedure in nullity was assimilated (as the decree being first *nisi* and not absolute till after six months) to the procedure in suits for dissolution of marriage,⁴ and the final declaration of nullity postponed till the decree absolute;⁵ and the Queen’s Proctor and other persons are empowered to intervene to prevent collusion.⁶ The suit may be heard *in camerâ*.⁷

(c) *Legitimacy Declaration Act, 1858*

The Legitimacy Declaration Act, 1858,⁸ enables any natural born subject desiring to establish the validity of

¹ *Langworthy v. L.* (1886), 11 P. D., 85, C. A.

² *Nokes v. Milward* (1824), 2 Add., 386, where two other cases are distinguished and the form of the decree given.

³ 20 & 21 Vict., c. 85, ss. 6, 22; and see *Andrews v. Ross* (1888), 14 P. D., 15; as to forms of these petitions, see Dixon on Divorce, 2nd ed., pp. 185–189; and for citation, see p. 211.

⁴ 36 Vict., c. 31; *Langworthy v. L.* (1886), 11 P. D., 85, C. A.; as to decrees *nisi* and procedure generally, see Chap. VII, s. 1 (e), p. 247.

⁵ *S. v. B.* (1884), 9 P. D., 80.

⁶ 36 Vict., 31; as to intervention, see Chap. VII, p. 261.

⁷ *C. v. C.* (1869), L. R., 1 P. & M., 640.

⁸ 21 & 22 Vict., c. 93; and see 22 & 23 Vict., c. 61, s. 7; as to the form of petition, see Dixon on Divorce, 2nd ed., pp. 196–199, 212–214.

his marriage, or his legitimacy, or the validity of his father and mother's or grandfather and grandmother's marriages, to petition the Probate and Divorce Division to declare such marriage valid; and the Court has jurisdiction and power to declare the validity or invalidity of such marriage. The petition proceeds in like manner as if instituted under the Matrimonial Causes Act, 1857.¹

The Attorney-General must always be served with copy of the petition and made a respondent,² and it is his duty to oppose and traverse the allegation;³ but the Court can in its discretion direct other persons to be cited,⁴ and the issue will be usually directed to be tried by a jury.⁵

The Act, however, only enables a person to apply for a declaration of *his own* legitimacy, not to obtain the declaration of other persons' illegitimacy, although a declaration of the validity of the marriage of the petitioner's father, mother, grandfather, and grandmother may involve such illegitimacy; and so a petitioner cannot get a declaration that his elder brother was born previous to the marriage of their parents.⁶

(d) Nullity as a Defence

In Dissolution or Judicial Separation.—If in the old suit for divorce the defendant denied the marriage on which the suit is founded and alleged a prior marriage,

¹ 21 & 22 Vict., c. 93, s. 4; see rule 174; and see *post*, Chap. VII, p. 247; and *ante*, p. 132, as to effect of decree.

² 21 & 22 Vict., c. 93, s. 6; *Shedden v. Patrick* (1860), 2 Sw. & Tr., 170.

³ *Ryves v. R. and A.-G.* (1865), L. R., 1 P. & M., 23.

⁴ 21 & 22 Vict., c. 93, s. 7; *Mansel v. The A.-G.* (1879), L. R., 4 P. D., 232, C. A.; and see *Brinkley v. The A.-G.* (1889), 14 P. D., 83; and *Bain v. The A.-G.* (1892), P., 217, 261, C. A.

⁵ *Re Bouverie* (1862), 2 Sw. & Tr., 548.

⁶ *Chaplin's Petition* (1867), L. R., 1 P. & M., 328; *Mansel v. The A.-G.*, *ubi sup.*

the original action was stayed and the question of the validity of the marriage determined before the question of adultery is gone into.¹ And now nullity is a good defence to a petition either for dissolution of marriage or for judicial separation.²

In Restitution of Conjugal Rights.—So in an action for restitution of conjugal rights the marriage may be denied by the defendant, and its validity will then be considered.³

In Jactitation.—The old suit for jactitation (now nearly obsolete), being a complaint that the defendant boasted that he or she was married to the plaintiff, may become a suit for nullity. For, if out of the three defences the defendant admits that “such representations have been made, but they are true, for that a marriage had actually passed, and in such a manner as to give the party the right to claim the benefit of it. In that state of things the proceeding assumes another shape, that of a suit of nullity and of restitution of conjugal rights, on an inquiry into the fact and validity of such asserted marriage; and it will depend upon the result of that inquiry whether they falsely pretended or truly asserted such a marriage. In the former case, the Court would pronounce a sentence of nullity, and enjoin silence in future.”⁴

¹ *Robins v. Wolseley* (1754), 1 Lee, 616, and see 2 Lee, 421; and see *Mayhew v. M.* (1812), 2 Phillim., 11.

² See Dixon on Divorce, 2nd ed., pp. 124 and 126; and see *ante*, Chap. III, p. 127, Proof of Marriage, s. 1 (*c*), and pp. 247, 248, 267.

³ *Conran v. Lowe* (1754), 1 Lee, 630; and see *Lindo v. Belisario* (1795), 1 Hag. Con., 216; such defences are usual, and a question of nullity or validity is often raised in a suit for restitution; and see Dixon on Divorce, 2nd ed., p. 128; and see *post*, Chap. X, s. 1 (*b*); and *ante*, pp. 128, 130.

⁴ Per Lord Stowell in *Hawke v. Corri* (1820), 2 Hag. Con., 280, p. 285; and see p. 130, and *post*, Chap. X, s. 2.

(e) *Other Actions*

Nullity of marriage may be also raised in an action for probate of will¹ or administration of the goods of an intestate,² or as against the Crown claiming the estate of an intestate bastard,³ or in a bill for dower,⁴ and in many other causes, as, *e.g.*, in the settlement of a pauper; see *ante*, Chap. III, Proof of Marriage, pp. 123–133.

SEC. 2.—WHO CAN SUE

(a) *Generally*

A slight interest is sufficient to enable persons to sue, and they need not be claiming through or representing the parties to the marriage.⁵ And any pecuniary interest is sufficient to entitle a person to bring an action for nullity,⁶ and he has a right to a decree.⁷ This is not so with regard to nullity for impotence, as to which and the reasons for such suit being personal, see *ante*, Chap. V, p. 215.

(b) *Parties to the Marriage*

Either of the parties to the marriage may sue to annul his or her marriage.⁸

¹ *Wilson v. Brockley* (1810), 1 Phillim., 132; *Steadman v. Powell* (1822), 1 Add., 58; but see *Warter v. W.* (1890), 15 P. D., 35.

² *Browning v. Reane* (1812), 2 Phillim., 69; in this case the cause was lunacy; *Wilkinson v. Gordon* (1824), 2 Add., 152; *Wiseman v. W.* (1867), L. R., 1 P. & M., 351.

³ *Dyke v. Wallis* (1862), 2 Sw. & Tr., 466; *Dyke v. Williams*, *ib.*, 491; *Queen's Proctor v. Williams* (1862), 4 Sw. & Tr., 221.

⁴ *Poole v. P.* (1831), Younge, 331.

⁵ *Faremouth v. Watson* (1811), 1 Phillim., 355.

⁶ *Ray v. Sherwood* (1837), 1 Moore P. C., 353.

⁷ *Pertreis v. Toudear* (1790), 1 Hag. Con., 139; and see *ante*, p. 224.

⁸ *Hodgkinson v. Wilkie* (1795), 1 Hag. Con., 262; *Andrews v. Roßs* (1888), 14 P. D., 15.

So in a suit of nullity on the ground of insanity at the date of the marriage, brought by the husband who had subsequently recovered, Lord Stowell laid down: "It is, I conceive, perfectly clear in law that a party may come forward to maintain his own *past* incapacity."¹

If either of the parties is a minor, he or she must sue or defend by a guardian; see *post*, p. 230.

(c) *Parents*

A father can commence an action for nullity in respect of his child's marriage, whether such child be an infant or adult, not merely if the father should have some specific pecuniary interest (see *ante*, p. 228), but also on account that he might be liable by statute under the Poor Laws (see Chap. XIV, s. 2 (b)) to maintain the grandchildren, issue of such marriage;² and on the like ground, after the liability cast on her by the Married Women's Property Act, 1882, s. 21 (see Chap. IV, s. 2 (b)), it is presumed that a mother can sue.³ The father can also sue as the infant's guardian (see *post*, p. 230), for the infant has a concurrent right of action.⁴ But it is doubtful if mere *patria potestas* would enable the father of an adult child to sue.⁵ If the father sues in his own right, he must cite both husband and wife.⁶

¹ *Turner v. Meyers* (1808), 1 Hag. Con., 414; and see *post*, pp. 232-235.

² *Ray v. Sherwood* (1837), 1 Moore P. C., 353, overruling *Turner v. Meyers*, 1 Hag. Con., 414, in *Wells v. Cottam* (1863), 3 Sw. & Tr., 364; for a recent action by a father, see *Templeton v. Tyre* (1872), L. R., 2 P. & M., 420; but the personal representatives of a father cannot sue in this respect, for his estate will not be liable, and therefore the action abates; *Bevan v. M'Mahon* (1859), 2 Sw. & Tr., 58.

³ And see *Prowse v. Spurway* (1876), 24 W. R., 850.

⁴ *Bowzer v. Ricketts* (1795), 1 Hag. Con., 213.

⁵ *Ray v. Sherwood*, *ubi sup.*, and 1 Curt., 173, 193.

⁶ *Wells v. Cottam*, *ubi sup.*

(d) Guardians

If either of the parties to the suit is an infant, he or she must sue a defendant by a guardian *ad litem* who can be compelled to act;¹ but a next friend of an infant will not be allowed to petition in the name of the infant for a declaration of the infant's legitimacy under the Legitimacy Declaration Act, until there has been an inquiry before the registrar whether the suit will be for the benefit of the infant, lest such next friend might with a view to his own interest be suing in order to have the infant declared illegitimate.² An infant respondent appearing by a guardian must previously elect a guardian, or a curator *ad litem* must be appointed.³

(e) Committee of a Lunatic

The committee of a lunatic may bring an action on his or her behalf to have the marriage avoided;⁴ but the sanction of the Court should be obtained to the suit,⁵ and if no committee has been appointed, a guardian *ad litem* will be constituted.⁶

¹ *Beauraine v. B.* (1808), 1 Hag. Con., 498; and see *Boraine's case* (1809), 16 Ves., 346; and *Beaurain v. Scott* (1813), 3 Camp. N. P., 388; *Turner v. Felton* (1812), 2 Phillim., 92; *Dennis v. D.* (1815), Arches, cited 2 Curteis, 687-690. And see the cases cited under (c) Parents, *ante*, p. 229, where such parent usually sued both *qua* parent in his own interest and also as child's guardian.

² *Re Chaplin* (1867), L. R. I., 1 P. & M., 328.

³ *Wells v. Cottam* (1863), 3 Sw. & Tr., 364.

⁴ *Fust v. Bowerman* (1789), Arches, cited 2 Add., 399, 402; and see *Portsmouth, Earl of, v. Portsmouth, Countess of* (1826), 3 Add., 63, 1 Hag. Ec., 355; and see Pope on Lunacy.

⁵ *Wilkinson v. W.* (1845), 4 N. C., 295.

⁶ *Fry v. F.* (1890), 15 P. D., 50, C. A.; *Hancock v. Peaty* (1867), L. R., 1 P. & M., 335.

(f) *Other Persons*

Any interest or liability, however slight, provided it be specific and pecuniary, entitles a party to bring nullity.¹

Remainder Men.—So persons claiming in remainder, however remotely or contingently, whether under a will or settlement, can bring nullity;² but it seems doubtful whether a mere *spes successionis ab intestato*, i.e., the chance of taking a share under the statute of distribution, or being heir to the person whose marriage is impeached in case such person dies intestate and childless, is sufficient to enable a party to sue.

Churchwardens.—But a liability under the Poor Law as to the statutory obligation to support children or grandchildren (see *post*, Chap. XIV, s. 2 (b)) will enable a father, or mother, or son to sue;³ and on like ground parochial authorities might sue in order to invalidate the marriage and bastardise the issue, and thereby avoid liability.⁴

Also when the Ecclesiastical Courts administered the Matrimonial as well as the Ecclesiastical Law, the churchwardens could and ought to proceed by a suit in a criminal form against a parishioner for incest, as in a marriage with a step-daughter; and in that suit the marriage might be declared void as well as penance inflicted; and not merely churchwardens, but any person by permission of the Court might promote the office of the judge.⁵ At the

¹ *Ray v. Sherwood* (1837), 1 Moore P. C., 353, by the delegates.

² *Ray v. Sherwood*, *ubi sup.*; *Faremouth v. Watson* (1816), 1 Phillim., 355, and see per Sir John Nicoll in *Chichester v. Donegal* (1822), 1 Add., 5, 16.

³ *Ray v. Sherwood* (1837), 1 Moore P. C., 333, p. 399.

⁴ *Ray v. Sherwood*, *ubi sup.*

⁵ *Blackmore v. Brider* (1816), 2 Phillim., 359; *R. v. Wye* (1838), 7 A. & E., 761; *Woods v. W.* (1840), 2 Curt., 516, marriage of uncle and niece; *Chick v. Ramsdale* (1835), 1 Curt., 34, where the wife's sister

present time, parish officers would usually litigate the legitimacy or marriage of a pauper in a settlement case; see *ante*, Chap. III, pp. 129, 130.

Sovereign.—And in the case of H.R.H. the Duke of Sussex, the Sovereign, acting through his Procurator General, sued for nullity under the Royal Marriage Act.¹

(g) *Interveners*

Any person who could by reason of having any interest institute the suit, may intervene in the suit and take part in it; as, *e.g.*, where there had been a double marriage and the first wife brought an action for restitution of conjugal rights, the second wife was allowed to intervene.²

Also the original parties to the suit of nullity may call on any other persons interested to come before the Court, in order that if so such third party as well as the original parties may be bound; but such third party cannot be compelled to come in.³

SEC. 3.—ESTOPPEL⁴

(a) *Generally*

In ordinary actions the conduct of the party may estop them, on the principle *volenti non fit injuria*, and a party would not be allowed to get rid of an obligation which

sued; and see *Ray v. Sherwood*, *ubi sup.*, pp. 396, 397; at the present day, since 1837, the Probate and Divorce Division has no power to inflict penance, which belongs to the Ecclesiastical Court; and the Ecclesiastical Court has no power to pronounce nullity; see Chap. VII, s. 1 (a). It is a canonical duty incumbent on the ministers and churchwardens to “present” to the bishop and archdeacon incestuous persons (Canon 109–119).

¹ 2 Add. 400, n.; and see *ante*, Chap. II, pp. 116–121.

² *Dalrymple v. D.* (1811), 2 Hag. Con., 137, n.

³ See *Chichester v. Donegal* (1822), 1 Add., s. 10; and see *Donegal v. Donegal* (1821), 3 Phillim., 586, 600; and see *Montague v. Montague* (1824), 2 Add., 372.

⁴ See *ante*, Chap. III, pp. 129–133.

they had entered into with their eyes open; but the principles prevailing in regard to the contract of marriage differ from those prevailing in all other contracts known to the law,¹ and so there is no estoppel in nullity; and however much time may have expired, however bad the petitioner's conduct may be, that is no bar to a decree of nullity.² And cases of nullity are properly described as cases in which the Court gives a reluctant obedience to the provisions of the law,—the first inclination of the Court is to support the marriage, as far as it can indulge such an inclination.³ But the petitioner will have to rebut all the presumptions as to what these are; see *ante*, Chap. III, pp. 139–146.

(b) By Delay or Misconduct

So where a marriage has been twice celebrated in order to make it more valid, and ten years of cohabitation had elapsed, and children had been born, still the Court on the suit of the wife, though reluctant, considered it an imperative duty to decree nullity.⁴

Or again, in a case of statutory nullity under Lord Hardwicke's Act, where the husband had married by licence under age without consent, the Court observed the words of the Act of Parliament are positive and peremptory, and the Court is under the necessity of enforcing it; it is better at any time to stop as soon as possible, lest the continuance should involve the interest of a greater number of persons, for *there is no length of time in which it will not affect the interests of parties*, and in this case, though the petitioning husband had

¹ Per Butt, J., in *Andrews v. Ross* (1888), 14 P. D., 15.

² See *Miles v. Chilton* (1849), 6 N. of C., 636; and see *ante*, p. 219.

³ Per Lord Stowell *Cresswell v. Cosins* (1815), 2 Phillim., 281; and see *ante*, p. 224, as to the sentence being declaratory.

⁴ *Days v. Jarvis* (1814), 2 Hag. Con., 172.

himself obtained the licence by falsely swearing that he was of age, the marriage was annulled.¹ The petitioner having aided the respondent in obtaining a collusive divorce to marry her, will not estop her showing divorce, and therefore marriage was void.²

Duty to separate.—Still, the proper course for the parties whose marriage is in question is to separate as soon as they know of its invalidity; and when a suit for nullity has been commenced, the parties ought to separate, for cohabitation would be legally censurable;³ and, in fact, in all these cases an allegation has commonly appeared that the complainant had withdrawn from all further cohabitation from the time when he discovered the alleged invalidity of the marriage.⁴

(c) *By Judgment*

The party proceeding may be bound by a previous decision of a Court in favour of the marriage; see *ante*, Chap. III, Proof of Marriage, s. 2, pp. 129–133, and see pp. 219, 285.

But a previous dismissal of a suit for nullity by an Ecclesiastical Court

“Would not legalise the marriage, but the marriage might be questioned, upon any claim of the wife’s, in any future transaction, in any Court where such claim was made.”⁵

And it also appears that a sentence given for or against

¹ *Johnston v. Parker* (1819), 3 Phillim., 39, where over twenty years had elapsed; and see *Hayes v. Watts*, *ib.*, 43, where the wife after eighteen years’ cohabitation petitioned to have it set aside; and see further, *Duins v. Donovan* (1830), 3 Hag. Ec., 301; and see *ante*, Chap. I, pp. 14, 15.

² *Bonaparte v. B.* (1892), the Times, Aug. 1, p. 9, Aug. 2, p. 10.

³ *Sullivan v. S.* (1824), 2 Add., 299, p. 302; *Nokes v. Milward*, *ib.*, 386, pp. 402, 403; and see *Clowes v. C.* (1845), 4 N. of C., 1, pp. 7, 8.

⁴ *Nokes v. Milward* (1824), 2 Add., 386, p. 402.

⁵ *Bowzer v. Ricketts* (1759), 1 Hag. Con., 213.

marriage during the life of the parties may be repealed after their death.¹

And in a probate suit where administration had been granted on the ground that a second marriage with a deceased wife's sister had revoked a will, still three years later a beneficiary under that will was allowed to prove such marriage invalid, and therefore to obtain probate, as the will was thereby not revoked.²

SEC. 4.—INCIDENTS OF THE SUIT.

(a) *Generally*

The suit generally proceeds in the same way, and according to the same procedure, as other petitions in the Probate and Divorce Division,³ but a petition for nullity may be heard *in camerâ*.⁴ Also a decree of confrontation can, following the old ecclesiastical practice, be made in the Probate and Divorce Division in a suit for nullity,⁵ *alite* in a suit for dissolution.⁶ The decree of nullity may have the incidental effect of validating a subsequent marriage; see *ante*, p. 34.

(b) *Alimony*

During the suit where a marriage *de facto* is admitted, the respondent will be given alimony *pendente lite*, and interim costs.⁷

After decree of nullity, when the marriage is pronounced

¹ *Kenn's case* (1607), Jenkins, 289, 7 Rep. 42b; Vin. Abr., Bastard (O).

² *Mette v. M.* (1859), 1 Sw. & Tr., 416; and see *Haviland v. Mortiboy* (1858), 4 Jur., N. S., 842.

³ See Dixon on Divorce, 2nd ed., pp. 185, 201, and *passim*; and see Chap. VII, s. 1 (e), 247.

⁴ *C. v. C.* (1869), L. R., 1 P. & M., 640.

⁵ *Enticknap v. Rice* (1865), 4 Sw. & Tr., 136.

⁶ *Hooke v. H.* (1858), 4 Sw. & Tr., 236; and see Chap. VII, s. 5 (a).

⁷ *Bird v. Bell* (1753), 1 Lee, 209; *Portsmouth v. P.* (1826), 3 Add., 63; and see *Miles v. Chilton* (1849), 1 Rob. Ec., 684; see Dixon on Divorce, 2nd ed., p. 408; and see Chap. XI, s. 1.

void owing to the respondent wife having a husband alive at the time of marriage, permanent alimony will not be given.¹ The Court has now the same power to grant alimony in suits of nullity as in suits for divorce;² as to which, see *post*, Chap. XI, s. 1.

(c) *Custody of Children*

The children of a void marriage are illegitimate (see *ante*, Chap. III, p. 147); but the Court has power to make, not merely interim, but also permanent orders as to the custody, maintenance, and education of the children, issue of a marriage it declares void. And in the *Langworthy* case the Court of Appeal refused to make the decree of nullity absolute till the father made suitable provision for the children born of the void marriage.³

(d) *Variation of Settlements*

The Court has the same power of, and jurisdiction over, dealing with and varying settlements in the case of nullity as it has in dissolution of marriage;⁴ as to how this would be exercised, see *post*, Chap. XI, s. 4.

(e) *Interrogatories*

The parties to a suit for nullity may be interrogated even although, as in nullity for bigamy, he or she could not answer without admitting a felony; but in such case the party interrogated may decline to answer.⁵

¹ *Bird v. Bell* (1754), Lee, 621.

² 36 Vict., c. 31.

³ 20 & 21 Vict., c. 85, s. 35; 22 & 23 Vict., c. 61, s. 4; 41 Vict., c. 19, s. 3; *Langworthy v. L.* (1886), 11 P. D., 85, C. A.; and see generally, Chap. XI, s. 6.

⁴ 22 & 23 Vict., c. 61, s. 5; but the Court cannot under this power vary a settlement when the marriage has been declared null and void by a foreign or colonial Court; *Moore v. Bull* (1891), P., 279.

⁵ *Euston v. Smith* (1884), 9 P. D., 57; *Harvey v. Lovekin* (1884), 10 P. D., 122.

CHAPTER VII

DISSOLUTION OF MARRIAGE¹

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¹ See Dixon on Divorce, 1891, 2nd ed.; Brown and Powles on Divorce, 1890. Statistics of divorce are given in a Return of Divorce and Matrimonial Causes in England, 1889 (80), of causes tried in the thirty years

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SEC. 1.—JURISDICTION AND PROCEDURE

(a) *Old Law abolished*

By the old Ecclesiastical Law a husband or wife could obtain from the Ecclesiastical Court a divorce *a mensa et*

from the establishment of the Court in 1857 down to 1887; and, as in the United States of America, a Report of Marriage and Divorce from 1867-86, 20,267 M.D., has been issued as a Government publication, the following statistics afford an exact comparison of England and America; but the American Report mentions that owing to the destruction by fire, or otherwise, of several court-houses with their records, the number of divorces are rather understated:—The population of England, taken from the Registrar-General's Returns, was 29,015,613 in 1889, and 25,371,489 in 1879; the population of the United States, taken from Whittaker, was 62,622,250 in 1890, and 50,155,783 in 1880, or roughly, the population of the United States is very nearly double that of England. The number of divorces for twenty years, 1867-88, is in England 4724, and in the United States 328,716. The ratio of the annual number of marriages to divorces was in England 718 to 1, and in the six States where exact statistics of marriage were kept, Connecticut 11·32, Columbia District 30·83, Massachusetts 31·28, Ohio 20·65, Rhode Island 11·11, Vermont 16·96 marriages respectively to one divorce. In the thirty years for 1858-87 there were in England 5,630,830 marriages, corresponding to 13,345 petitions for divorce or judicial separation, out of which there were pronounced 7321 decrees for dissolution and 985 for judicial separation. The ratio of these is, in respect of 1000 marriages, 2·370 petitions for relief, 1·300 decrees of dissolution, ·175 for judicial separation, *i.e.*, out of each 1000 marriages only 3 came before the Divorce Court. The average number of dissolutions granted per annum, taking the five years 1883-87, is 358, as compared to 333 in the five years 1878-82—an increase about corresponding to the increase of population. In the United States the increase has been

thoro on proving against the other party adultery or cruelty, or sodomy or attempted sodomy, unless such complainant was barred by *compensatio criminis*, i.e., being themselves guilty of a similar matrimonial offence, or *exceptione personali*, such as connivance.¹ But this divorce did not leave the parties free to remarry, and if they did, it was bigamy.² The husband could also bring an action of criminal conversation against a man committing adultery with his wife, and recover damages.³

Further, it was the practice after a divorce *a mensa et thoro*, and a verdict for the petitioner in an action of criminal conversation, or either, for the husband and—but more rarely—the wife to obtain a private Act of Parliament dissolving the marriage. This system being so expensive as to amount to a denial of justice to the poor, a Royal Commission was appointed to inquire into it, and reported against it.⁴ After considerable discussion in Parliament the present system was adopted by the passing of the Matrimonial Causes Act, 1857; see *ante*, Chap. I, pp. 11, 12.

much more, for while the population has increased by 30·1 per cent., the divorces have increased by 79·4 per cent.; the ratio of married couples to divorces was in 1870, 664, while in 1880 it had sunk to 481. In the United States the average duration of marriage before divorce is 8·97 years for husbands, as opposed to 9·27 years for wives, or both together 9·17; also 25,371 couples were divorced after more than twenty-one years' cohabitation. There are no statistics in England as to the average duration of a divorced marriage.

¹ For details of old ecclesiastical practice and divorce, see the text-books, Clarke's *Praxis*, tit. cvii., cxiii., cxiv.; the Clerk's Instructor in the Ecclesiastical Courts, chap. iv., pp. 386–406; Oughton, tit. cxcii., ccxiii., ccxv.; Shelford on Marriage and Divorce, the latest, and the Reports of the Ecclesiastical Courts; and see the Report of the Ecclesiastical Courts Commission, 1831 (70), 1883 [c. 3760], and Divorce Commission, 1872, 13 [1604].

² *Porter's case* (1637), Cro. Car., 461; and see *ante*, pp. 11, 12.

³ See *post*, p. 255.

⁴ See Macqueen's House of Lords' Practice; see Report of Divorce Commission, 1852, 53 [1604]; and see *ante*, pp. 17, 18.

The Matrimonial Causes Act, 1857, enacted that after the coming into operation of the Act

“All jurisdiction now exercisable by any Ecclesiastical Court in England in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits for jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, shall cease to be so exercisable except so far as relates to the granting of marriage licences ;”¹ and “no decree shall hereafter be made for a divorce *a mensa et thoro* ;”² and “after this Act shall have come into operation no action shall be maintainable in England for criminal conversation ;”³

and a Secretary of State has power to order all records (except marriage licences) of the Ecclesiastical Courts to be removed.⁴

(b) *Divorce Court established in 1857*

The Matrimonial Causes Act, 1857, after reciting in the preamble—

“Whereas it is expedient to amend the law relating to divorce, and to constitute a Court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage,” enacted, “As soon as this Act shall come into operation all jurisdiction now vested in or exercisable by an Ecclesiastical Court or person in England in respect of divorce *a mensa et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licence, shall belong and be vested in Her Majesty ; and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty in a Court

¹ 20 & 21 Vict., c. 85, s. 2 (see this transfer of jurisdiction considered, *Niboyet v. N.* (1878), 4 P. D., 1, C. A.) ; the preservation of existing decrees and pending suits is provided for by ss. 2, 3, 4, 5 ; and see also 21 & 22 Vict., c. 108, s. 5.

² *Ib.*, s. 7.

³ *Ib.*, s. 59.

⁴ *Ib.*, s. 66. Under this power an order was made on the 2nd of Feb. 1858, by Sir George Grey, directing the Registrar of the Consistory Court of London to transmit all records, etc., in that Court to the Registrar of the Court of Probate. The author is informed by Mr. Alexander Pulling, editor of the Index to the Statutory Rules and Orders, that no other or further order under this power has been made.

of Record, to be called 'The Court for Divorce and Matrimonial Causes.'"¹

The Judicature Act, 1873.—By the Judicature Act, 1873, the jurisdiction vested in, or capable of being exercised by, the Court for Divorce and Matrimonial Causes was transferred to and vested in the High Court of Justice,² and the Probate, Divorce, and Admiralty Division was constituted a Division of the High Court;³ and there was assigned to that Division all causes and matters which would have been within the exclusive cognisance of the Court for Divorce and Matrimonial Causes.⁴

Power to make rules and regulations concerning the practice and procedure was conferred by the Matrimonial Causes Act, 1857; it was subsequently exercised by the Judge Ordinary, and is now vested in the President of the Probate and Divorce Division, and the former rules continue till altered;⁵ and the rules of the Supreme Court do not apply to proceedings for Divorce and Matrimonial Causes.⁶ As at first constituted, the powers of the Court were distributed between the Judge Ordinary and the full Court of Divorce. The Judge Ordinary could exercise all the ordinary powers of the Court except petitions for dissolution or nullity of marriage and applications for

¹ 20 & 21 Vict., c. 85, s. 6.

² 36 & 37 Vict., c. 66, s. 16 (17).

³ *Ib.*, s. 31. The proper title is "The Probate and Divorce and Admiralty Division 'Divorce.'" See *Anon* (1875), 1 Charley, N. P. C., 41.

⁴ 36 & 37 Vict., c. 66, s. 34.

⁵ 20 & 21 Vict., c. 85, ss. 53, 67; *Charles v. C.* (1866), L. R., 1 P. & M., 260; *Wilson v. W.* (1871), L. R., 2 P. & M., 341; 38 & 39 Vict., c. 77, s. 18. For the rules, see Index to Statutory Rules and Orders, 1891; they are printed in full in the Appendix B and D to Dixon's Divorce, 2nd ed.

⁶ R. S. C. Ord., 68, r. 1 (d); *Harvey v. Lovekin* (1884), 10 P. D., 122, C. A.; *Redfern v. R.* (1891), P., 139, C. A.

new trials, which were reserved to the full Court, consisting of several judges, three of whom, including the Judge Ordinary, constituting a quorum.¹

But by the Matrimonial Causes Act, 1860, the Judge Ordinary was given all the power to determine alone whatever was previously reserved for the full Court, but with an appeal to the full Court.² By the Judicature Act, 1873, there are to be two judges of the Probate and Divorce Division, of whom the senior is the President; and each has jurisdiction sitting alone.³

Appeals.—The appeal from the decision of each or either of these judges is now to the Court of Appeal and not to the full Court,⁴ even in cases of applications for new trials;⁵ and from the Court of Appeal to the House of Lords, except in those cases where the decision of the Court of Appeal is final.⁶

The appeal is to be from the order *nisi* and not from the order absolute, and the time for appealing to the House of Lords is one month after the judgment appealed against is pronounced if the House of Lords is then sitting, or if not sitting, then fourteen days after the House of Lords next sits:⁷ the time for appealing to the Court of Appeal is three months.⁸

¹ 20 & 21 Vict., c. 85, ss. 8, 9, 10, and 11; and see 22 & 23 Vict., c. 61.

² 23 & 24 Vict., c. 144; *Robinson v. R.* (1877), 2 P. D., 77, C. A.; and as to appeal, see also s. 55 of 20 & 21 Vict., c. 85.

³ 36 & 37 Vict., c. 66, s. 31 (5).

⁴ Judicature Act, 1881, 44 & 45 Vict., c. 68, s. 9.

⁵ *Ib.*, 1890, 53 & 54 Vict., c. 44.

⁶ *Ib.*, 1881, 44 & 45 Vict., c. 68, s. 9.

⁷ *Ib.*, ss. 9, 10; *Cleaver v. C.* (1884), 9 App. Ca., 631. See the debate on giving to one judge the power formerly entrusted to the full Court, Hansard, 3rd series, vol. clvii., pp. 1873–1883; vol. clviii., pp. 126–134; vol. clx., pp. 1742–1755.

⁸ 20 & 21 Vict., c. 85, s. 55; but on a refusal of a new trial in fourteen days, *Ahier v. A.* (1885), 10 P. D., 110.

(c) *Jurisdiction* ¹

The Court established by the Matrimonial Causes Act, 1857, is a Court for England only ; and Scotland, Ireland, and the Channel Isles are exempt from its jurisdiction, as foreign countries.² So an Irish husband whose domicil of origin was Irish, and who resided at Sackville Street, Dublin, was not allowed to petition.³ When the matrimonial domicil was in the Channel Islands the petition was dismissed.⁴ The Court, however, has jurisdiction, not merely over persons domiciled in England, but over persons who, though not domiciled, are (although foreigners) *bonâ fide* resident in England, not merely casually or travellers. The fact that the adultery was committed abroad is more or less immaterial, but the Court mainly considers whether or not the matrimonial home is England ;⁵ if it is so, all persons who stand in the legal relation of husband and wife have a claim to relief on the ground of any violation of the matrimonial duty.⁶

Where the domicil is English there is jurisdiction, although the marriage and the adultery may be abroad.⁷ When the wife is the petitioner the maxim that the domicil of the husband is the domicil of the wife may

¹ The effect in England of a divorce granted by a foreign tribunal is discussed *post*, Chap. XVII.

² *Yelverton v. Y.* (1859), 1 Sw. & Tr., 574 ; and see *Forster v. F.* (1863), 4 B. & S., 187 ; *Dasent v. D.* (1849), 7 N. of C., 126.

³ *Manning v. M.* (1871), L. R., 2 P. & M., 223 ; as definition of domicil, see p. 244, n. 3, and *post*, Chap. XVII. As to Ireland, see Chap. XIX.

⁴ *Le Sueur v. Le S.* (1876), 1 P. D., 139.

⁵ *Niboyet v. N.* (1878), 4 P. D., 1, C. A. ; *D'Etchegoyen v. D'E.* (1888), 13 P. D., 132 ; *Wilson v. W.* (1872), L. R., 2 P. & M., 341, 435 ; *Santo Teodoro v. S. T.* (1876), 5 P. D., 79 ; *Goulden v. G.* (1892), P., 240.

⁶ *D'Aguiar v. D'A.* (1794), 1 Hag. Ec., sup. 773.

⁷ *Ratcliff v. R.* (1859), 1 Sw. & Tr., 467 ; *Goulden v. G.* (1892), P., 240.

compel her to sue him in the Courts of the country where he resides ; but if the matrimonial home was English, the wife has in many cases been allowed to petition here, according to the principles above laid down.¹ But where the marriage and the cohabitation and the adultery was in Jersey, and the husband having deserted his wife and gone to reside in America, although she acquired a *bonâ fide* domicile in England, yet it was held she could not petition in England.² But although a husband may have deserted his wife and gone out of the jurisdiction, his domicile may still remain English, and if so the wife can sue in the English Court.³

Objection to the jurisdiction may be waived by the respondent appearing absolutely, in which case there must be an answer on the merits.⁴

(d) *Grounds for Dissolution of Marriage*

“It shall be lawful for any *husband* to present a petition to the said Court praying that his marriage may be dissolved on the ground that his wife, since the celebration thereof, has been guilty of adultery ; and it shall be lawful for any *wife* to present a petition to the said Court praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years and

¹ *Niboyet v. N.*, *ubi sup.* ; *Santo Teodoro v. S. T.*, *ubi sup.* ; and see *ante*, pp. 165, 166.

² *Le Sueur v. Le S.* (1876), 1 P. D., 137.

³ Domicil is where a person has his true fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Wharton's Law Lexicon. The subject of domicile is a very intricate one. For a more detailed elucidation the professional reader is referred to Dicey on Domicile ; and see, too, *post*, Chap. XVII ; and see *Goulder v. G.* (1892), P., 240.

⁴ *Bond v. B.* (1860), 2 Sw. & Tr., 93 ; *Zycklinski v. Z.* (1862), 2 Sw. & Tr., 420 ; *Callwell v. C.* (1863), 3 Sw. & Tr., 259 ; *Wilson v. W.* (1871), L. R., 2 P. & M., 341 ; but see *Grange v. G.* (1892), P., 245.

upwards.”¹ “In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has” (done what amounts to an absolute bar to the decree; as to what those absolute bars are, see *post*, p. 267, s. 3), “then the Court shall pronounce a decree declaring such marriage to be dissolved, provided always that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has” done amounts to (see *post*, s. 4) a discretionary bar.²

So if the petitioner comes into Court with clean hands he has an absolute right to his decree;³ but in certain cases where he is guilty of some acts (as to what these are, see *post*, s. 4, pp. 286–304), it lies in the discretion of the Court whether or not to grant it; but if he has been guilty of certain other acts, it is the duty of the Court to dismiss the petition; see *post*, s. 3, pp. 267–286.

As regards these suits for dissolution, Lord Hannen laid down—

“This Court, in suits for dissolution, is not bound to act on the principles on which the Ecclesiastical Courts formerly acted, such suits being already excluded from the operation of 20 & 21 Vict., c. 85, s. 22. On the other hand, I am bound as far as possible to maintain uniformity in the decision of this Court, and to apply the principles that my predecessors have established in the exercise of the novel jurisdiction created by the Act of 1857.”⁴

If the petitioner has already obtained a decree for judicial separation, he or she may, if the respondent commits a fresh matrimonial offence, proceed to obtain a dissolution, supposing, that is to say, that the combined offences put together raise a sufficient ground for a dissolution of marriage.

¹ 20 & 21 Vict., c. 85, s. 27.

² 20 & 21 Vict., c. 85, s. 31.

³ See per Lord Chelmsford, L. C., *Mordaunt v. Moncreiffe* (1876), L. R., 2 Sc. & D., 374.

⁴ *M'Cord v. M'C.* (1875), L. R., 3 P. & M., 237; and see *Mordaunt v. Moncreiffe* (1876), L. R., 1 Sc. & D., App., 374, p. 385, where Lord Chelmsford, L. C., declared that they were exercising a new statutory jurisdiction.

As, for instance, where the judicial separation was for the husband's cruelty, and he subsequently committed adultery, the wife obtained a dissolution of marriage;¹ and in another case where the husband had been guilty of cruelty and adultery, and the wife, although entitled to a dissolution, yet wishing to allow her husband a chance of reform, waived this remedy, and only asked for and obtained a judicial separation, but subsequently the husband having committed fresh adultery, the wife was held entitled to a dissolution of marriage on the ground of the fresh adultery coupled with the old cruelty committed during the previous cohabitation.² If the husband has only been guilty of adultery alone, and his wife obtains a judicial separation in consequence, she runs the risk of never being able to turn her remedy into a dissolution; for *ex necessitate rei* after a judicial separation a husband cannot be guilty of cruelty or desertion, and subsequent simple adultery, not incestuous or bigamous, will give her no further rights. In fact, in such a case, unless the husband commits the somewhat unusual matrimonial offences of incestuous adultery, bigamy, and adultery or sodomy, she will never be able to obtain a dissolution. But it is a wise and prudent course for a wife to obtain a judicial separation for cruelty or desertion, as after this, in the event of her husband committing subsequent adultery, she will have the option of petitioning for a dissolution. If the husband is guilty of adultery alone without cruelty or desertion, and the wife wishes to free herself, her prudent course is to separate at once, otherwise she might be barred by condonation; see *post*,

¹ *Bland v. B.* (1866), L. R., 1 P. & M., 237.

² *Green v. G.* (1873), L. R., 3 P. & M., 121, followed *Mason v. M.* (1883), 8 P. D., 21, C. A., where it was the husband who first asked and obtained a judicial separation for his wife's adultery, and subsequently, she continuing adulterous, asked for and obtained a dissolution.

s. 3 (d), p. 272. She should not sue for judicial separation, for without any suit the law allows her to quit a husband living in adultery, and she is not thereby deemed guilty of desertion; but, on the contrary, if the husband continues to live in adultery, he, although it is the wife who quitted him, will be guilty of desertion, and at the end of two years she will be entitled to dissolution, if, that is to say, he continues in adultery. For—

“If a man is living with another woman, the wife is justified in saying, ‘I shall not return to you, nor shall I allow you to have access to me while you are living in open adultery with another woman.’”

So continued adultery ripens into desertion.¹

(e) Procedure

Petition.—The application is by petition.²

“And every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded.”³

Together with the petition is to be filed an affidavit verifying the same so far as the petitioner is able to do so, and stating that there is no collusion or connivance between the deponent and the other party to the marriage;⁴ and the petition is to be served on the party affected by it unless the Court dispenses with service.⁵ The marriage of petitioner and respondent must be alleged in the petition, and proved at the hearing.⁶

¹ *Farmer v. F.* (1884), 9 P. D., 245; *Knapp v. K.* (1880), 6 P. D., 10; and see *post*, s. 5 (d), p. 342.

² 20 & 21 Vict., c. 85, s. 27; and see rule 1, and see form 1.

³ *Ib.*, s. 27.

⁴ *Ib.*, s. 41; and see rules 2 and 3.

⁵ *Ib.*, s. 42; and as to citation and service, see rules 8–18 and forms 2–5.

⁶ *Dixon on Divorce*, 2nd ed., p. 294; *Pagani v. P.* (1866), L. R., 1 P. & M., 223; and see *ante*, Chap. III, pp. 127, 226, 227; and see *post*, s. 3 (b) (h).

Trial.—The question of fact may be determined by the Court itself, *i.e.*, by a judge sitting alone, or by a judge with a special or common jury;¹ but any of the parties has a right to have the contested matters of fact tried by a jury.² The Court has power to direct trial of an issue at Assizes, but it is rarely exercised.³ As to evidence, see *post*, s. 5.

The finding of the jury is not conclusive on the Court; for even when there is a jury there is a duty on the Court, *i.e.*, the judge, to satisfy itself as to the proofs of facts alleged; and though it almost always follows the finding of the jury, it is not bound by it.⁴ Therefore the Court sometimes refuses a decree notwithstanding a verdict by the jury in the petitioner's favour; but it may be laid down that the Court has never granted a decree contrary to the verdict, although in a single case the Court has considered the unsatisfactory character of the adverse verdict a reason for exercising its discretion (see s. 4, p. 286) in the petitioner's favour.⁵ The trial must be in open Court, and there is no power or authority, even by assent of all parties, to hear a petition for dissolution privately *in camerâ*.⁶

¹ 20 & 21 Vict., c. 85, ss. 36–40.

² 20 & 21 Vict., c. 85, s. 28; and see rules 40–50, 205, 206. In undefended case, the trial is without a jury; *Thompson v. Rourke* (1892), P., 244, C. A. Also the Court may direct trial by jury, though neither party desires it; *Ratcliff v. R.* (1858), 2 Sw. & Tr., 217.

³ 20 & 21 Vict. c. 85, s. 40; *Evans v. E.* (1858), 1 Sw. & Tr., 216, and see *post*, pp. 352, 373.

⁴ *Barnes v. B.* (1868), L. R., 1 P. & M., 572; and see *Dering v. D.* (1868), *ib.*, pp. 531, 535; and *Dolby v. D.* (1861), 2 Sw. & Tr., 228; *Narracott v. N.* (1864), 3 Sw. & Tr., 408; and see *Long v. L.* (1890), 15 P. D., 218; and see *post*, ss. 3 (b), 4 (a).

⁵ *Conradi v. C.* (1868), L. R., 1 P. & M., 514; *Barnes v. B.*, *ubi sup.*

⁶ *Barnett v. B.* (1859), Sea. & Sm., 20; *C. v. C.* (1869), L. R., 1 P. & M., 640; *aliter* as to nullity or judicial separation, see *A. v. A.* (1875), L. R., 3 P. & M., 230; and see *ante*, pp. 213, 225, and *post*, p. 355. When the Divorce Bill was introduced, a clause to that effect was in the Bill, but it was struck out in Parliament; see *Barnett v. B.*, *ubi sup.*;

Decree nisi.—Every decree for a divorce shall in the first place be a decree *nisi*, and no decree *nisi* for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the Court shall fix a shorter time ;¹ and during that period the Queen's Proctor or any one of the public can intervene. As to such intervention, see *post*, p. 261 ; as to the effect of decree *nisi*, see Chap. XIII. On the decree *nisi* the *lis* is at an end as between the parties.²

Decree absolute.—After the expiration of six months from the decree *nisi*, and on proof that there has been no intervention,³ the petitioner can apply to have the decree made absolute ; but even in case there is no intervention the petitioner has no absolute unconditional right to have the decree made absolute at the end of six months ; and the making of the decree absolute may be suspended till the petitioner complies with the conditions, as, *e.g.*, provision for a child that the Court deems just and proper.⁴ Occasionally, in exceptional circumstances, the

and see a discussion in House of Commons, April 22, 1887, on the motion of S. Smith, against the publication in newspapers of the offensive details of divorce cases, Hansard, 3rd series, vol. cccxiii., pp. 1660–1673. By French Law, Code Civil, Article 239, divorce cases may, by order of the Court, be heard with closed doors ; and it is forbidden to report them in the newspapers.

¹ 23 & 24 Vict., c. 144, s. 7 ; 29 & 30 Vict., c. 32, s. 3 ; 47 & 48 Vict., c. 68, s. 5. ; *Watton v. W.* (1866), L. R., 1 P. & M., 227 ; decrees *nisi* only apply to petitions for dissolution of marriage and not to judicial separation, restitution of conjugal rights, or jactitation ; see Chaps. VIII and X ; they were applied to nullity suits by 36 Vict., c. 31 ; see *ante*, Chaps. V and VI, pp. 213, 225.

² *Latham v. L.* (1861), 2 Sw. & Tr., 299 ; *Ousey v. O.* (1875), 1 P. D., 56 ; *Midwinter v. M.* (1892), P., 28, 35, C. A.

³ Rules 80, 194, and 207. No motion need be made in Court, but an affidavit is filed in the registry, whereupon a decree is pronounced in open Court. As to registration of decrees absolute, see *ante*, p. 34 ; as to their effect, see *post*, Chap. XIII, s. 3.

⁴ *Watton v. W.* (1866), L. R., 1 P. & M., 227 ; *Langworthy v. L.*

Court shortens the period of six months, and makes the decree absolute more quickly.¹

It is only the petitioner who can apply to have the decree *nisi* made absolute ; and if he or she fails to apply, the respondent cannot apply ; but if the petitioner makes a long default, the respondent can ask to have the petition dismissed for want of prosecution.²

If the petitioner dies after the decree *nisi* the suit abates, and his or her personal representatives cannot have the suit revived in order that a decree absolute may be pronounced ;³ but the Court has made a decree absolute notwithstanding a suggestion that the respondent and co-respondent, who had gone to South America together, had both died of yellow fever meanwhile, and within a few days of one other.⁴

As to showing cause against decree *nisi*, see *post*, 2 (g), p. 261.

Enforcement of Orders and Decrees.—It was enacted by the Matrimonial Causes Act, 1857, that all decrees and orders of the Court might be enforced and put in execution in the same way as orders and decrees of the High Court of Chancery ;⁵ that is to say, by attachment of the party,⁶ or sequestration of his or her

(1886), 11 P. D., 85, C. A. ; and see *Dering v. D.* (1868), L. R., 1 P. & M., 531, but not to give a solicitor his costs ; *Patterson v. P.* (1870), L. R., 2 P. & M., 192.

¹ *Watton v. W.*, *ubi sup.* ; *Fitzgerald v. F.* (1874), L. R., 3 P. & M., 136 ; *M. v. B.*, *ib.*, p. 200.

² *Ousey v. O.* (1875), 1 P. D., 56 ; *Halfden v. Boddington* (1881), 6 P. D., 13 ; *Hancock v. H.* (1867), L. R., 1 P. & M., 334 ; *Lewis v. L.* (1892), P., 212 ; neither can the respondent show cause against the decree being made absolute, *Stoate v. S.* (1861), 2 Sw. & Tr., 384.

³ *Stanhope v. S.* (1886), 11 P. D., 103, C. A.

⁴ *Dering v. D.* (1868), L. R., 1 P. & M., 531.

⁵ 20 & 21 Vict., c. 85, s. 52 ; and as to costs, see Chap. XI, s. 5.

⁶ *Lynch v. L.* (1885), 10 P. D., 183 ; *Bates v. B.* (1888), 14 P. D.,

effects. The attachment usually preceded sequestration; but if the party in contempt is abroad out of the jurisdiction, so that a writ of attachment would be idle, and the Court is satisfied that he has notice of the order, sequestration of the party's goods will be ordered at once.¹

The Court has also power to grant an injunction;² and as to restraining a respondent from leaving the jurisdiction or removing his goods, see *post*, Chap. XI, s. 1 (a).

SEC. 2.—WHO CAN SUE AND BE SUED

(a) *The Parties*

A petition for divorce is a personal act to be initiated by the husband or wife; the petitioner has to sign the petition personally, and make an affidavit to the truth of its allegations; see *ante*, p. 247. The necessary parties to the suit are the husband and wife, whether as petitioner or respondent, the co-respondent, *i.e.*, the man with whom the wife is alleged to have committed adultery, and at her option the woman with whom a husband is alleged to have committed adultery; see *post*, pp. 254, 255.

The death of the petitioner or respondent makes the suit abate (see pp. 250, 252), although it would seem that the death of the wife would not prevent the husband presenting a petition for damages against the co-respondent; see *post*, pp. 256, 257.

17, C. A.; *De Lossy v. De L.* (1890), 15 P. D., 115; *Clarke v. C.* (1891), P., 278; and see rules 110–112, 179, 203.

¹ *Dent v. D.* (1867) L. R., 1 P. & M., 366; *Miller v. M.* (1870), L. R., 2 P. & M., 54; *Allen v. A.* (1885), 10 P. D., 187; *Hyde v. H.* (1888), 13 P. D., 166, C. A.; and see pp. 381–383.

² *Noukes v. N.* (1877), 4 P. D., 60; *Newton v. N.* (1885), 11 P. D., 11; *Gillet v. G.* (1889), 14 P. D., 158.; and see pp. 381–383.

(b) Guardian of a Minor

If the petitioner or respondent, *i.e.*, the husband or wife, are minors, he or she appears by his or her elected guardian. But a minor co-respondent can appear and defend without a guardian.¹

(c) Committee of a Lunatic

The lunacy of a petitioner or respondent does not bar a petition for dissolution, it being a civil proceeding. The committee of the estate of a husband or wife may either present a petition or defend one for the respondent, or the respondent might appear by a guardian *ad litem*.² If the lunatic's wife, previous to the decree of dissolution, gives birth to a child which it is alleged is illegitimate, the Lords Justices in Lunacy may direct proceedings to be taken to raise the question of that child's legitimacy.³

(d) Executor or Administrator

A suit for divorce is a personal action, and according to the maxim *actio personalis moritur cum personâ* the executor or administrator of a dead petitioner can neither

¹ R. R., 105-108; see *Redfern v. R.* (1891), P., 139, where the respondent wife was a minor; *Beavan v. B.* (1862), 2 Sw. & Tr., 652, where the petitioning husband was a minor. In the old Ecclesiastical Courts a minor sued or defended by guardian, see *Beauraine v. B.* (1808), 1 Hag. Con., 498; *Morgan v. M.* (1841), 1 N. of C., 23; *Brown v. B.* (1850), 2 Rob. Ec., 302.

² *Baker v. B.* (1880), 5 P. D., 142; 6 P. D., 12, C. A.; *Mordaunt v. Moncreiffe* (1874), L. R., 2 H. L. Sc. & Div. App., 374; and see Rule 196, and *Fry v. F.* (1890), 15 P. D., 25, 50, C. A. It is for the Lords Justices in Lunacy, in their discretion, to determine whether or not the committee shall petition. It had been previously allowed that the committee of a lunatic might sue for judicial separation; *Woodgate v. Taylor* (1861), 2 Sw. & Tr., 512.

³ *Stoer in re* (1884), 9 P. D., 120.

commence nor continue a petition for dissolution of marriage or judicial separation after the petitioner's death.

"A man can be no more divorced after his death than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives, unless it be dissolved sooner, and the Court cannot dissolve a union which has already been determined."

In this case a husband had obtained a decree *nisi* for dissolution on May 11, 1883, and died July 27, 1883, before it was made absolute. It was subsequently decided that the respondent who had married again was entitled to a life interest in £15,000 bequeathed by the petitioner's father, who died in 1881, to the petitioner's widow. Thereupon the petitioner's executor asked leave to intervene in order to have the decree *nisi* made absolute. But the Court of Appeal, for reasons above given, decided that the executor could not revive the suit; and so the state of marriage not being dissolved at the petitioner's death, the respondent as his widow was entitled to her life interest in the £15,000.¹ But in a previous case where it was suggested by interveners, the parents of the respondent, that the respondent wife and the co-respondent had died meanwhile, soon after the decree *nisi*, in South America, of yellow fever, the Court nevertheless on the application of the petitioner made the decree absolute.²

(e) Respondent

After the petitioner has filed his petition he or she must extract a citation,³ and have it served on the respondent personally, unless he or she is by leave allowed to make substituted service;⁴ the respondent can then

¹ *Stanhope v. S.* (1886), 11 P. D., 103, C. A.; and see *Brocas v. B.* (1861), 2 Sw. & Tr., 383; *Grant v. G.* (1862), *ib.*, p. 522; and see *ante*, pp. 250, 251.

² *Dering v. D.* (1868), L. R., 1 P. & M., 531.

³ Rules 8 and 9.

⁴ Rules 10-18.

appear absolutely ; or if he or she objects to the jurisdiction of the Court, he or she can appear under protest.¹ After appearance the respondent can file an answer either denying the charge or setting up countercharges by way of bar (see *post*, ss. 3 and 4), or both, denying and counterpleading. If, however, the respondent's answer contains matter other than a simple denial of the charges in the petition, the respondent must verify such additional matter by affidavit filed. Further, the respondent who appears and answers must always file an affidavit stating that there is no collusion or connivance between the petitioner and the defendant.²

Besides defending and resisting a petition for dissolution brought against him or her, the respondent can obtain relief as if he or she were petitioner in a cross suit. The Matrimonial Causes Act, 1866, provides—

“In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground, in the case of a suit instituted by the husband, of his adultery, cruelty, or desertion, or in case of such suit by a wife, on the ground of her adultery or cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief.”³

If under this power the respondent makes a countercharge of adultery against his wife with some third person, such person may at all events on his own application to intervene be made a party.⁴ Also the woman with whom a respondent husband is alleged to have committed adultery may, on denying the adultery, also on her own application

¹ Rules 19-22, 185 ; see form 6.

² Rules 28-31, 186 ; and see form 7.

³ 29 & 30 Vict., c. 32, s. 2 ; but this does not enable the respondent to add a prayer for restitution of conjugal rights ; *Drysdale v. D.* (1867), L. R., 1 P. & M., 365 ; and see *post*, Chap. X, s. 1.

⁴ *Curling v. C.* (1888), 14 P. D., 13 ; *Wheeler v. W.* (1889), 14 P. D., 154.

be made a respondent so as to take part in the suit and cross-examine.¹

(f) *Co-respondent and Damages*

When a husband petitions for dissolution of marriage he must, whether or not he claims damages, make the alleged adulterer a party, unless the Court on special grounds excuses him.² Also on a wife's petition, the person with whom the husband is alleged to have committed adultery can and will on such person's application be made a party.³ Damages against such alleged adulterer may be claimed by the husband in any petition for dissolution, or for judicial separation, or in a petition for damages only.⁴ The co-respondent is liable for costs.⁵ The petition against the co-respondent is triable on the same principles as the old actions for criminal conversation.⁶ But notwithstanding this a co-respondent can set

¹ *Bell v. B.* (1883), 8 P. D., 217; and see n. 3, *infra*.

² 20 & 21 Vict., c. 85, s. 28, rules 4-7; for grounds on which a petitioner will be excused from making the adulterer a co-respondent, see Dixon on Divorce, 2nd ed., pp. 225-227. On a respondent husband recriminating adultery against a petitioning wife, the man with whom the petitioner is alleged to have committed adultery may be made a party; *Curling v. C.* (1888), 14 P. D., 13; *Wheeler v. W.* (1889), 14 P. D., 154. A separate list of all the co-respondents is kept at the Divorce Registry, Somerset House. As to an infant co-respondent, see p. 252.

³ 20 & 21 Vict., c. 85, s. 28; and see *Bell v. B.* (1883), 8 P. D., 217; *Connemara v. C.* (1892), P., 102; but the petitioning wife can make no claim for damages against such person; see *ante*, Chap. IV, s. 2(c), p. 190.

⁴ 20 & 21 Vict., c. 85, s. 33; as to damages in judicial separation, see *Mason v. M.* (1883), 8 P. D., 21; a petition for damages only is but rarely filed, *Pomero v. P.* (1884), 10 P. D., 174.

⁵ 20 & 21 Vict., c. 85, s. 34; and see *Forster v. F.* (1863), 4 B. & S., 187.

⁶ 20 & 21 Vict., c. 85, s. 33; for explanation of the old action of crim. con., see Selwyn's *Nisi Prius*, vol. i., tit. Adultery; Buller's *Nisi Prius*, 7th ed., p. 26a; Chitty on Pleading, 5th ed., tit. Crim. Con. The remedy was either in "trespass" or in "case"; see *Macfadzen v. Olivant* (1805), 6 East, 387.

up other matters than would be available to a defendant in *crim. con.* For in the action of *crim. con.*, the only defence available, assuming the marriage and the adultery to be proved, is connivance by the plaintiff; any other inofficious conduct by the husband only went in reduction of damages.¹ But a co-respondent can not only deny the adultery charged, but set up any bar whether absolute or discretionary (see *post*, ss. 3 and 4) which would be available to the respondent wife as defence against her husband; and so if the decree *nisi* is rescinded on account of the petitioner's adultery, the co-respondent will be relieved from the costs and the damages the jury had previously assessed against him.² Also if the co-respondent can prove connivance even with a man other than himself, the petition will be dismissed.³ Also a separation deed between husband and wife bars any claim to damages against previous but not subsequent adultery, though it might mitigate the damages.⁴ On the other hand, it occasionally happens that a husband can get costs and damages against the co-respondent, when as against the wife he would be barred as in a case of condonation,⁵ or if the co-respondent had ravished the wife,⁶ in both of which cases the co-respondent is liable. Also if the wife is dead, the husband can still, if otherwise entitled, as

¹ *Foley v. Lord Peterborough* (1785), 4 Doug., 294; see *Duberley v. Gunning* (1792), 4 T. R., 651 and 657; *Wyndham v. Wycombe* (1801), 4 Esp., 15; *Bromley v. Wallace* (1802), 4 Esp., 237; *Winter v. Henn* (1831), 4 C. & P., 494; and see books referred to, p. 255, n 6.

² *Ravenscroft v. R.* (1872), L. R., 2 P. & M., 376; *Story v. S.* (1887), 12 P. D., 196; but see *per contra*, *Hulse v. H.* (1871), L. R., 2 P. & M., 357.

³ *Ellyatt v. E.* (1869), 3 Sw. & Tr., 503; *Adams v. A.* (1867), L. R. 1 P. & M., 333; and see *Otway v. O.* (1887), 13 P. D., 12, 141, C. A.

⁴ *Lard v. I.* (1889), 14 P. D., 45.

⁵ *Pomero v. P.* (1884), 10 P. D., 174.

⁶ *Long v. L.* (1890), 15 P. D., 218.

when he only discovered it on her deathbed, recover damages against the adulterer.¹

If sufficient evidence is not made out against the co-respondent, as, for instance, when the wife's confession detailed by the petitioner as a witness is the principal evidence, the co-respondent may be dismissed at the end of the petitioner's case.² The co-respondent can also raise defence of want of jurisdiction.³

Measure of Damages.—As to the principles on which the jury is to assess damages, regard must be had to the husband's loss, and as to how far that loss can be traced

¹ *Wilton v. Webster* (1835), 7 C. & P., 198.

² 21 & 22 Vict., c. 108, s. 11; and see *Crawford v. C.* (1886), 11 P. D., 150, following *Robinson v. R.* (1858), 1 Sw. & Tr., 362. In *Crawford v. C.*, tried before Butt, J., without a jury, on Feb. 12, 1886, the chief witness in support of the petition was the petitioner himself, Mr. Crawford, who related at length, and in minute detail, confessions made to him by his wife, in which she described various act of adultery committed by her with the co-respondent, ranging over a period of several years. Two other witnesses were called who confirmed the evidence of the petitioner in minor particulars. Mrs. Crawford was not then called as a witness. Mrs. Crawford's confession to the petitioner, related by him as a witness, was evidence against her; but the petitioner being only able to swear to what his wife told him, this was no evidence against Sir C. W. Dilke, M.P. The judge thereupon found that the respondent had been guilty of adultery with the co-respondent, but that there was no admissible evidence to show that the co-respondent had been guilty of adultery with respondent, and thereupon dismissed Sir C. W. Dilke, M.P., and pronounced a decree *nisi*. On May 5, the Queen's Proctor intervened to show cause why the decree *nisi* should not be made absolute, on the ground that the charge of adultery on which it was granted was not true. It was heard before Lord Hannen and a jury on July 16 and several following days; the Queen's Proctor called witnesses, and then the petitioner called as a witness Mrs. Crawford, who gave evidence that her confession was true, and gave evidence of adultery. Thereupon the Queen's Proctor's intervention was dismissed and the decree made absolute. If Mrs. Crawford had been a witness at the first trial her evidence would have been admissible against Sir C. W. Dilke; and see *post*, Evidence, s. 5, p. 307.

³ *Wilson v. W.* (1871), L. R., 3 P. & M., 353; *Grange v. G.* (1892), P., 245; and see *ante*, pp. 243, 244.

to the co-respondent's action. Lord Hannen, President, in charging the jury, observed—

“First, you must remember that you are not here to punish at all . . . all that the case permits a jury to give is compensation for the loss which the husband has sustained. That is the only guide to the amount of damages to be given. But, undoubtedly, if it is proved that a man has led a happy life with his wife, that she has taken care of his children, that she has assisted in his business, and then some man appears upon the scene and seduces the wife away from the husband, then the jury will take those facts into consideration. But the question in this case, as in so many others, is whether or not these losses have been cast upon the petitioner by the action of the co-respondent. If he did not seduce her away from her husband, that makes a very material difference in considering the amount of damages to be given. In considering these questions, undoubtedly the conduct of the husband must be looked to. . . . If you come to the conclusion that he did not make any earnest inquiry after her, that is a fact you could consider when you are considering the damages he has sustained by some man consorting with her afterwards. What can any husband expect who has separated from his wife, who he knows has no means?” . . . (A jurymen having asked what were the means of the co-respondent, the President added) : “The means of the co-respondent have nothing to do with the question. The only question is what damage the petitioner has sustained, and the damage he has sustained is the same whether the co-respondent is a rich or a poor man.”¹

Evidence that the husband and wife were on good or bad terms previous to the adultery, is admissible in aggravation or reduction of damages; and to prove this, letters between husband and wife are sometimes put in.²

¹ *Keyse v. K.* (1866), 11 P. D., 100; and on this principle, where a curate of no means committed adultery with the wife of a rich merchant married many years, and mother of five children, he was cast in damages for £2000; and see *James v. Biddington* (1834), 6 C. & P., 589. On the other hand, the Marquis of Anglesey, see *Bell v. B.* (1859), 1 Sw. & Tr., 565, was cast for £10,000, the judge dwelling on his taking advantage of the prestige of his rank to debauch a vain woman. A jury are apt to take Boulton's view of a peer as co-respondent—“The nobleman would have dealt with her like a nobleman,” *Pericles*, Act VI, scene 6.

² *Pollard v. P.* (1864), 3 Sw. & Tr., 613; and see *Willis v. Bernard* (1832), 5 C. & P., 342; *Trelawney v. Coleman* (1817), 1 B. & Ald., 90; *Wilton v. Webster* (1835), 7 C. & P., 198; *Elsam v. Favcett* (1797), 1 Esp., 562; *Edwards v. Crock* (1801), 4 Esp., 39.

Also as to the effect, in the measure of damage, of a *separation deed* previous to the adultery, Butt, J., charged a jury—

“The amount of injury suffered is the pecuniary injury to the husband. It must be obvious to any one that if a husband and wife have consented to live separately, and have, in fact, lived separately for a number of years, the injury to the husband would be compensated by the smallest amount of damages. But each case varies with the different circumstances of life, and I have no hesitation in telling you that if a man makes the acquaintance of another man's wife, engages her affections, and is the cause of her separation from her husband, and then, after such separation, commits adultery with her, the husband is entitled to the same amount of damages as he would have been entitled to if no separation deed had been executed between them, and that even if no adultery had been committed before the separation.”

In this case, where the respondent was a well-known opera bouffe singer and the co-respondent the lessee of the theatre at which she performed, the damages were assessed at £5000.¹

An agreement between the petitioner and co-respondent fixing the amount of the damages will not be recognised ; they must be assessed by a jury.²

It was laid down as a rule in cases of *crim. con.*, that a new trial on the ground of excessive damages would very rarely be granted, unless it were proved that the jury must have acted under the influence of undue motives or some gross error or misconception.³

Apportionment of Damages.—The damages assessed by the jury are not *ipso facto* the property of the husband, and he cannot recover them as in an ordinary action by judgment and execution following.

¹ *Izard v. I.* (1889), 14 P. D., 45 ; and see *Harvey v. Watson* (1844), 2 Dowl. & L., 343 ; and as to separation deeds, see pp. 200, 271, 272, 275, 284, 339.

² *Callwell v. C.* (1860), 3 Sw. & Tr., 259. An agreement to pay damages is void ; *Gipps v. G.* (1864), 11 H. L. C., 1.

³ *Wilford v. Berkeley* (1758), 1 Burr., 609 ; *Chambers v. Caulfield* (1805), 6 East, 244.

The Court has by the statute power, instead of ordering damages to be paid to the petitioner, to direct that the whole or a part of them should be settled on the respondent or the children of the marriage. This power is often, nay, usually exercised; the husband rarely gets the whole absolutely. This apportionment is purely a matter for the Court's unfettered discretion, which is exercised according to the differing circumstances of each case.

For instance, where the damages paid by the co-respondent were £5000, the Court ordered £1500 to be settled on the youngest child, who alone remained with the petitioner, £1500 to go to the petitioner, who was also to be reimbursed his costs, and the residue to be invested in the purchase of a life annuity for the respondent, to be paid her as long as she lived chastely and did not become the wife of the co-respondent, and on her breaking these conditions to be paid to the petitioner. The object of this condition was that the co-respondent being a married man, and subsequent to the suit having visited the respondent, it was intended by this condition to prevent the respondent troubling the married life of the co-respondent and his wife; but it was not made a condition that the respondent should not remarry, except as regards the co-respondent.¹ Damages, however, are not often asked for, but costs for or against the co-respondent are adjudged on the same principles according to his culpability. There

¹ *Meyeur v. M.* (1876), 2 P. D., 254; and *Forster v. F.* (1863), 3 Sw. & Tr., 158, where out of £5000 damages, £1000 were given to the petitioner, and then an annuity of £120 to the respondent, *dum casta viverit*, and in breach of that condition, remainder to her daughters, and the residue of the fund to the daughters; and see *Narracot v. N.* (1869), 3 Sw. & Tr., 408, 4 Sw. & Tr., 76, where the condition was *dum casta* and not *dum sola vixerit*; and see Chap. XI, s. 1 (d), s. 4 (c), as to *dum casta* clause, pp. 391, 392, 402.

are three positions as to costs, that the petitioner should pay the co-respondent's costs, that the co-respondent should pay the petitioner's costs, or that each party should pay their own costs.

It is only when the petition is dismissed that the petitioner will be ordered to pay the co-respondent's costs, and then not always ; see *ante*, p. 256. But even if the petitioner is successful, the co-respondent will not be ordered to pay the petitioner's costs if he did not know that the respondent was a married woman,¹ or if he and the respondent acted on a *bonâ fide* belief that the marriage between the petitioner and the respondent was void.² The subsequent bankruptcy and discharge of the co-respondent does not release him from liability under a judgment against him for damages and costs unless specially so ordered.³

(g) *Intervention*

The Matrimonial Causes Act, 1857, directed that the Court should satisfy itself as to and inquire into collusion between the parties, and as to whether there was any counter-charge or bar against the petitioner ;⁴ but it did not provide any machinery to put the Court upon its inquiry, nor could a stranger without any legal private interest intervene.⁵

Intervention of the Queen's Proctor.—But in 1860⁶

¹ See Dixon on Divorce, 2nd ed., pp. 467 and seq.

² *Ousey v. O.* (1874), L. R., 3 P. & M., 223.

³ Bankruptcy Act, 1890, 53 & 54 Vict., c. 71, s. 10 ; and as to proceedings in bankruptcy and for committal under the Debtors Acts, see special books, and *ex parte* Fryer (1886), 17 Q. B. D., 718, C. A.

⁴ 20 & 21 Vict., c. 85, ss. 29-31.

⁵ *Y. v. Y.* (1860), 1 Sw. & Tr., 598.

⁶ The Matrimonial Causes Act, 1860, 23 & 24 Vict., c. 144. This provision of the Act, being in a Bill introduced in the Lords creating an official to be paid out of funds from time to time to be voted by Parliament, brought about a constitutional conflict between the Houses of

this defect was remedied by putting into activity and conferring the function of intervention upon an official called the Queen's Proctor, whose previous duties had been confined to representing the rights of the Crown, first in the Ecclesiastical and then in the Probate Court, to the estates of intestates.¹ The Matrimonial Causes Act, 1860, empowered the Court to direct the papers to be sent to the Queen's Proctor, who was then under the direction of the Attorney-General, to appear and argue.²

Further, the Matrimonial Causes Act, 1860, provided that—

“At any time during the progress of the cause or before the decree is made absolute, any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; if from such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice

Parliament; the Commons protesting against a Bill to lay a charge on the revenue being introduced except in their House as so infringing the rules against money bills. The merits of this new measure, introducing a “Public Ear” to receive informations, it may be anonymous or proceeding from discontented servants, were never discussed; see Hansard, 3rd series, vol. clx., pp. 1628–1631, 1734–1742. The theory of this enactment is that it “supposes that the public is interested in seeing that no marriage is dissolved except on certain grounds; and if the Queen's Proctor comes to the conclusion that there is a ground for supposing that a decree has been obtained contrary to the justice of the case, it is his duty to intervene.” Lord Hannen, *Crawford v. C.* (1886), 11 P. D., 150; and for other facts of this case, see *ante*, p. 257, and see also p. 266. In Scotch divorce cases, the Lord Advocate has never intervened since 1857; see *post*, Chap. XVIII. In France, the State, *i.e.* *le ministère public*, has a right of audience in divorce cases, Code Civil, art. 239.

¹ These duties of representing the Crown in intestacy are now vested in the Solicitor to the Treasury, who is a Corporation, 39 & 40 Vict., c. 18.

² 23 & 24 Vict., c. 144, s. 5; for instances of the Court exercising this power, see *Ousey v. O.* (1875), 1 P. D., 56; *Le Sueur v. Le S.* (1876), 2 P. D., 79, C. A.; *Sottomayer v. De Barros* (1877), 2 P. D., 81.

of the case, he may, under the direction of the Attorney-General and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpoena witnesses to prove it.”¹

Under this section the Queen’s Proctor can only intervene to set up *collusion* after obtaining the direction of the Attorney-General and by leave of the Court. The Court generally gives leave, as a matter of course, to intervene; but it has power to withdraw and withhold its leave to intervene, acting as a Court of Appeal from the decision of the Attorney-General.²

Intervention by one of the Public.—Not only the Queen’s Proctor, but also any of the public, though without any interest, pecuniary or otherwise, can intervene. For the Matrimonial Causes Act, 1860, provides that between the decree *nisi* and the decree absolute—

“Any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not being brought before the Court; and on cause being so shown, the Court shall deal with the cause by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry as justice may require.”³

This part of the section authorises intervention by any of the public, whether interested or not. The intervener cannot be the respondent,⁴ or any one actually instigated by him or her, or his or her nominee; but the mere fact

¹ 23 & 24 Vict., c. 144, s. 7. As to the practice of intervention by the Queen’s Proctor, see rules 68, 69, 202; the Queen’s Proctor or other interveners may be condemned in costs if unsuccessful, 41 Vict., c. 19, s. 2.

² *Gladstone v. G.* (1875), L. R., 3 P. & M., 260; as to what is collusion, see *post*, s. 3 (f), p. 228.

³ 23 & 24 Vict., c. 144, s. 7; and see rules 70–76 as to procedure and intervention by one of the public.

⁴ *Stoate v. S.* (1861), 2 Sw. & Tr., 384; the respondent must appeal and ask for a new trial, see *ante*, p. 242.

that the intervener may be (as he usually is) the friend or relative of the respondent is no objection.¹ The Queen's Proctor can also intervene under this part of the section as one of the public, but under the direction of the Attorney-General; and although he alleges collusion, he need not obtain the leave of the Court.² But this section does not permit the Queen's Proctor or any one else to intervene on any other grounds except collusion (as to which, see pp. 263, 282) and suppression of material facts. It does not give him the right to intervene because he may suspect that the verdict on the issues previously tried was an improper one, or contrary to the weight of evidence;³ but although a particular charge of adultery had been before the Court investigated or decided, yet an intervener may bring forward fresh material facts in proof or disproof of the same particular former charge of adultery, to show that the verdict ought to have been the other way.⁴ The intervention can only be after the decree *nisi*. If, previous to or during the first trial, information be given to the Queen's Proctor, not giving rise to a suspicion of collusion, but only bringing to his knowledge matters material to the due decision of the case, he is not entitled to take any step; but he could watch the case to see if these material facts are brought to the notice of the Court. If at the trial they are brought forward, he need do nothing more; but if not, he can intervene as one of the public.⁵

¹ *Howarth v. H.* (1884), 9 P. D., 218, C. A.; and see *Forster v. F.* (1863), 3 Sw. & Tr., 158.

² *Dering v. D.* (1868), L. R., 1 P. & M., 531; *Gladstone v. G.* (1875), L. R., 3 P. & M., 260; *Hudson v. H.* (1875), 1 P. D., 65; *Sottomayer v. De Barros* (1879), 5 P. D., 94; *Crawford v. C.* (1886), 11 P. D., 150; and see rule 202, and *ante*, p. 263.

³ *Gladstone v. G.*, *ubi sup.*

⁴ *Crawford v. C.*, *ubi sup.*

⁵ *Hudson v. H.*, *ubi sup.*

Such suppression of material facts includes, not only facts by the suppression of which the charge against the respondent on which the decree *nisi* was granted may be proved untrue,¹ but may be also fresh matters and charges in opposition to the decree as proving the petitioner guilty of conduct amounting to an absolute or discretionary bar,² or setting up question of domicile and jurisdiction.³

As to the suppression of material facts, such mere suppression, if not done by collusion, will not of itself disentitle the petitioner to a decree absolute if when the full facts are disclosed he or she would otherwise be entitled. As when a petitioning husband, charging his wife with two successive acts of adultery, suppressed the fact that he had condoned the first act of adultery, and the Queen's Proctor having intervened, this condonation was proved; but as it was shown that the second adultery was uncondoned, the decree was made absolute.⁴ But it is not necessary for the intervener to prove that the facts were intentionally withheld, for an accidental suppression of material facts justifies intervention.⁵

When the Queen's Proctor intervenes to prove the petitioner's adultery, he is not bound to that strictness of proof required between petitioner and respondent; for if the Queen's Proctor makes out a *prima facie* case, the petitioner is bound to produce evidence to rebut it.⁶

It often happens that the Queen's Proctor, whether by the direction of the Attorney-General or as one of the

¹ *Crawford v. C.* (1886), 11 P. D., 150.

² *Dering v. D.* (1868), L. R., 1 P. & M., 531; as to what is an absolute or discretionary bar, see *post*, ss. 3 and 4.

³ *Sottomayer v. De Barros* (1879), 5 P. D., 94; see *ante*, pp. 243, 244.

⁴ *Alexandre v. A.* (1870), L. R., 2 P. & M., 164, observed upon in *Butler v. B.* (1890), 15 P. D., 66, C. A.

⁵ *Howarth v. H.* (1884), 9 P. D., 218, C. A.

⁶ *Hulse v. H.* (1871), L. R., 2 P. & M., 357; see *post*, pp. 309 and seq.

public, acts on information supplied by the respondent or co-respondent or his or her friends, and so to get the case reopened and retried. Lord Penzance said—

“It seems to me that there is no impropriety whatever in a co-respondent or a respondent furnishing to the Queen’s Proctor the facts which he brings before the Court in cases of this kind. It is for the Queen’s Proctor, when he has had the facts furnished to him, to submit them to Her Majesty’s Attorney-General, and it is then for the Attorney-General to consider them, and to direct whether, in the interest of the public, the expense ought to be incurred of proving them, with a view of stopping the decree. To my mind it matters little or nothing from what source the information comes.”¹

But in the case where Sir C. Dilke was made a co-respondent, and after a decree *nisi* against the respondent on the ground that she had committed adultery with Sir C. Dilke, the Queen’s Proctor intervened, and Lord Hannen, the President, observed—

“I wish to express in the strongest possible manner my repudiation of the notion that this intervention has been undertaken in the interests of the co-respondent. If it were so, the Queen’s Proctor would have failed in his duty. I must assume that the Queen’s Proctor has not acted for the protection of the co-respondent, but because he thinks that the facts require that the Court should come to the conclusion that the confession of Mrs. Crawford is not true.”²

However, said Lord Hannen, he should not put forward a purely speculative plea of collusion, which would have to be abandoned at the trial for want of evidence. The plea is one which ought to be based on some information which leads the Attorney-General to the conclusion that there is a case fit and proper to be submitted to the Court in support of the charge.³

Rescission of Decree.—If the decree *nisi* is rescinded and the petition dismissed, the petitioning wife has still

¹ *St. Paul v. St. P.* (1869), L. R., 1 P. & M., 739.

² *Crawford v. C.* (1886), 11 P. D., 150; and see the facts of this case *ante*, p. 257.

³ *Gladstone v. G.* (1875), L. R., 3 P. & M., 260.

been allowed to enforce a previous order for costs against her husband;¹ but in another case where a sum of money was in Court, an application by her to get it out of Court and paid to her, was refused,² and the money was ordered to be paid out to the Queen's Proctor.³ As to effect on the costs of a petitioning husband, see *ante* (f), pp. 256, 261.

SEC. 3.—ABSOLUTE BARS

(a) *Generally*

“Upon such petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any way accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any counter-charge which may be made against the petitioner.”⁴ “In case the Court, on the evidence in relation to the said petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has, during the marriage, been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then, and in any of the said cases, the Court shall dismiss the said petition.”⁵

(b) *Petitioner's Case not proved*

The Court is bound to see that the petitioner's case is made out,⁶ even if the case is undefended. The petitioner must prove his allegations by evidence, and nothing material can be taken as admitted.⁷ In undefended cases, the trial is by the Court and not by a jury.⁸

¹ *Whitmore v. W.* (1866), L. R., 1 P. & M., 96; and *Gludstone v. G.* (1875), L. R., 3 P. & M., 260.

² *Butler v. B.* (1889), 14 P. D., 160; 15 P. D., 32, 126, C. A.

³ *Butler v. B.* (1890), 15 P. D., 161.

⁴ 20 & 21 Vict., c. 85, s. 29.

⁵ 20 & 21 Vict., c. 85, s. 30.

⁶ 20 & 21 Vict., c. 85, ss. 29–31.

⁷ *Dixon on Divorce*, 2nd ed., pp. 287, 294.

⁸ *Thompson v. Rourke* (1892), P., 244, C. A.

(c) *Connivance*

The Court is bound to satisfy itself, so far as it reasonably can, that the petitioner has not been accessory to or conniving at the adultery; and the connivance, if made out, is an absolute bar.¹ If the connivance amounts to procuring the wife, it is a criminal offence for which the husband may be prosecuted; see *post*, Chap. XV, s. 5.

Connivance was a good plea in bar to the old Common Law action of criminal conversation;² and it was also in Canon Law, under the name of *lenocinium*, a bar to obtaining a divorce in the old Ecclesiastical Courts on the principle *volenti non fit injuria*, but in practice, previous to 1790, such an allegation was very rare.³ A plea of connivance does not necessarily admit adultery.⁴

Connivance may be objected either against husband or wife petitioning.

Differing from condonation, it seems now settled that a single connivance at adultery with a particular person is a bar to a suit in respect of subsequent adultery or adultery with another person; it is not open to the petitioner having once connived at adultery to say *non omnibus* or *non semper dormio*, and to subsequently sue; in other words, there is no reviver.⁵

¹ 20 & 21 Vict., c. 85, ss. 29–31.

² See Bullen's N. P., tit. Adultery, 7th ed., pp. 26a, 27a; Selwyn's N. P., tit. Adultery, 10th ed., vol. i., p. 8; and see *ante*, pp. 255, 256.

³ See *Hodges v. H.* (1795), 3 Hag. Ec., 118, p. 120, where Sir W. Wynne cited *Cibber v. C.* (1738) as the only known instance.

⁴ *Rogers v. R.* (1830), 3 Hag. Ec., 57, p. 58; *Moorson v. M.* (1792), 3 Hag. Ec., 87, p. 91.

⁵ *Lovering v. L.* (1792), 3 Hag. Ec., 85; *Crewe v. C.* (1800), *ib.*, 123; Lord Stowell, *Stone v. Stone* (1844), 3 N. of C., 278, p. 282; *Gipps v. G.* (1863), 3 Sw. & Tr., 116, 11 H. L. C., 1, refusing to follow *Hodges v. H.*, *ubi sup.*; and see *Adams v. A.* (1867), L. R., 1 P. & M., 333; as to reviver, see *post*, pp. 280, 281.

Connivance and condonation (see *post* (d), p. 272) are

“Essentially different in their nature, though either may have the same legal consequence. Condonation might take place without imputing, either in the case of a wife or of a husband, the slightest degree of blame. . . . But connivance necessarily involves criminality on the part of the individual who connives; and as the blame sought to be imputed is the more serious, so ought the evidence in support of such a charge to be more grave and conclusive.”¹

“Connivance must be the act of the mind before the offence has been committed; condonation is the result of a determination to forgive an injury which was not known till after it was inflicted.”²

Connivance usually (but not necessarily, for the husband may be laying a trap for his wife and her paramour) implies collusion.³

As to what amounts to Connivance.—Since 1790 connivance has frequently been discussed by the judges in the Ecclesiastical Courts. In a more recent case that went from the Consistory Court through the Arches up to the Privy Council, in which all the previous authorities were considered, it was laid down that there must be knowledge and intention on the part of the petitioner, an active or passive conspiracy towards, or complicity in, the guilt of the respondent; and without intentional concurrence or corrupt connivance there is no bar.⁴

Since the Matrimonial Causes Act, 1857, facts short of connivance may constitute that wilful neglect and misconduct conducing to adultery which is a discretionary bar; see *post*, s. 4 (f), pp. 297–304.

In an early case after the Matrimonial Causes Act,

¹ *Turton v. Turton* (1830), 3 Hag. Ec., 338, p. 350.

² Bouvier's Law Directory (Amer.); in fact, connivance consists in the husband being an accessory, passive or active, before the act; condonation arises from subsequent pardon.

³ *Crewe v. C.* (1800), 3 Hag. Ec., 123, pp. 129, 130; as to collusion, see *post*, p. 282.

⁴ *Phillips v. P.* (1846), 3 N. of C., 444; 4 *ib.*, 523; 5 *ib.*, 435. Several cases on connivance are gathered together in 3 Hag. Ec., 57–155, as cited in *Rogers v. R.* (1830), *ib.*

1857, tried before the full Court, Hill, J., thus charged the jury—

‘That the jury must take the law from the Court as to what constituted connivance. That in order to justify them in finding by their verdict that the husband had been guilty of connivance, they must be satisfied from the facts, which have been established in evidence, that he had so connived at his wife’s adultery as to have given a willing consent to it. They would have to consider whether he was or not an accessory before the fact. Mere negligence, mere inattention, mere dulness of apprehension, mere indifference, would not suffice; there must be an intention on his part that she should commit adultery. If such a state of things had existed as would in the apprehension of reasonable men result in the adultery of the wife, whether that state of things was produced by the connivance of the husband or independent of it, and if the husband, intending that the adultery should take place, did not interfere, when he might have done so, to protect his own honour, he was guilty of connivance.”¹

In 1864 the House of Lords decided that the word connivance in the Act meant, not merely refusing to see an act of adultery, but also wilfully abstaining from taking any step to prevent adulterous intercourse, which, from what passes before the husband’s eyes, he must reasonably expect will occur.²

And the full Court laid down that this knowledge and acquiescence is to be proved like any other conclusion of facts, either by express language or inference deducted from facts and conduct.³ There must be willing consent beforehand to the adultery; ⁴ and where

“The result of the whole evidence is that there was a good deal of weakness on his part, and want of proper spirit and determination in the matter, but that being desirous not to part with his wife, he was overpersuaded that there was nothing wrong in her conduct,”

this is not connivance.⁵

¹ *Allen v. A.* (1860), 2 Sw. & Tr., 108, n.

² *Gipps v. G.* (1864), 11 H. L. C., 1.

³ *Boulting v. B.* (1863), 3 Sw. & Tr., 329.

⁴ *Marris v. M.* (1862), 2 Sw. & Tr., 530.

⁵ *St. Paul v. St. P.* (1869), L. R., 1 P. & M., 739; and as to admis-

Knowledge is a material fact in connivance as in condonation; but in condonation the time of the knowledge coming to the petitioner must be subsequent to the adultery, and prior to the acts constituting condonation (see *post* (d), p. 272); in connivance the same degree of knowledge *probabilis scientia* must be brought home to the petitioner, but at an earlier date, *i.e.*, prior to the adultery complained of. But knowledge alone will not constitute connivance, although without knowledge there can be no connivance.¹ Closely connected with this is the consideration of the proper conduct of the husband or wife who suspects the other; as to this, see *post* (d), pp. 277–281.

The points to which the Court will pay attention are as follows:—

First, what acts were done by the wife.

Secondly, what came to the knowledge of the husband.

Thirdly, what might reasonably have come to his knowledge.

Fourthly, what the husband did do, and what he did not do.²

Mere “inofficious” conduct by a husband, such as introducing his wife to a Royal mistress, will not amount to connivance.³

A separation deed may amount to connivance; but this will not be determined on the mere wording of the deed, but the evidence will be admitted as to whether or not it

sibility of evidence of representations by the wife to the husband in disproof of connivance, *Hoare v. Allen* (1801), 3 Esp., 276.

¹ *Stone v. S.* (1844), 3 N. of C., 278, p. 304, and 4 N. of C., 274.

² *Phillips v. P.* (1844), 3 N. of C., 444, p. 466. Dr. Lushington’s judgment was expressly affirmed by the Archers, 4 N. of C., 523; by the Privy Council, 5 N. of C., 435.

³ *Harris v. H.* (1829), 2 Hag. Ec., 376, pp. 413–416; and see *Graves v. G.* (1842), 3 Curt., 235; see *post*, s. 4 (f), pp. 297–304.

was the intention of the party to connive. The evidence of this would be that the innocent spouse knew of the other's guilty intimacy, and knowingly consented to him or her leaving the matrimonial cohabitation to be free to live at pleasure with his or her paramour.¹ If this be so, it does not matter whether the innocent party consented willingly or not; as Lord Penzance observed—

“If it were established that the wife consented, as one of the conditions of the grant of the allowance, to the husband continuing the adulterous intercourse which had been established, such consent would in my opinion amount to connivance, even if it were extorted from her by pressure of circumstances in which she was placed, unless, of course, the pressure to which she was subjected amounted to that degree of force which would invalidate any agreement. She might be very unwilling to consent; but if in the end she withdrew her scruple for the sake of getting an allowance, I think she would be guilty of connivance.”²

(d) *Condonation*²

The Court is bound to satisfy itself whether or not the petitioner has condoned the adultery of the respondent; and such condonation if made out constitutes an absolute bar, and obliges the Court to dismiss the petition.³ So even although not pleaded, the Court will, if manifest, take notice of it.⁴

In practice, condonation is the most frequent bar that prevents an innocent spouse from proceeding against the other party; in fact, the usual question by the solicitor to his client after hearing about the matrimonial grievance

¹ *Ross v. R.* (1869), L. R., 1 P. & M., 734; and see *Studdy v. S.* (1858), 1 Sw. & Tr., 321; *Thomas v. T.* (1860), 2 Sw. & Tr., 113; and as to separation deeds, see pp. 220, 259, 275, 284, 339.

² As to what effect condonation by the respondent of a matrimonial offence of the petitioner has on removing the discretionary bar, see *post*, s. 4 (b), pp. 290–292.

³ 20 & 21 Vict., c. 85, ss. 29–31.

⁴ *Curtis v. C.* (1858), 1 Sw. & Tr., 192; 4 Sw. & Tr., 234.

complained of is, "What did you do when you discovered your wife's [or husband's] adultery; did you separate instantly?"

But although condonation creates a bar against the petitioner in favour of the respondent, yet condonation alone is no bar against the petitioner recovering damages from the co-respondent. So a man who, notwithstanding the adultery, has taken his wife back to live with him, can yet recover damages against the adulterer.¹

In any case condonation only bars the remedy as regards *past and prior* matrimonial offences, so that in order that condonation may defeat the petition, it must be proved to have been subsequent to the offence alleged. If a guilty spouse after being forgiven relapses, the condonation is no bar to the innocent spouse having remedy for the subsequent matrimonial offence,² nay, such subsequent offence "revives" the former; see *post*, pp. 280, 281. Otherwise condonation would amount to universal licence to unlimited debauchery.³ As to what amounts to condonation, *i.e.*, whether the petitioner had condoned the respondent's offence, this is a question of fact, and to be decided by the jury under the direction of the judge;⁴ or if the Court sits without a jury, then by the Court deciding as a jury questions of fact.

Condonation is a bar to all the diverse matrimonial offences, adultery, cruelty, etc. These offences vary, in that some, like cruelty, etc., must be known to the injured party, and others, such as adultery, may be

¹ *Pomero v. P.* (1884), 10 P. D., 174, not following *Norris v. N.*, (1861), 4 Sw. & Tr., 237; and see p. 256.

² *Sanchez*, bk. x., disp. 5, No. 20; and see *Ferrers v. F.* (1788), 1 Hag. Con., 130; and *Wilton v. W.* (1859), 1 Sw. & Tr., 563; and see *Alexandre v. A.* (1870), L. R., 2 P. & M., 164, and see p. 265.

³ *D'Aguilar v. D'A.* (1794), 1 Hag. Ec., 773, p. 787.

⁴ *Peacock v. P.* (1858), 1 Sw. & Tr., 183.

unknown. As to these latter offences, which are or may be secret, a knowledge is essential to condonation, so that acts which would otherwise amount to a bar of condonation may be explained away by showing that the innocent condoning spouse was then ignorant of the matrimonial offence committed by the other. Also it is established in practice that condonation is not pressed so strictly against the wife as the husband. It is very difficult, therefore, to frame an exhaustive definition. The Canonists and Civilians described *remissio* as a reconciliation, whether tacit or express.¹ Oughton declares that it is constituted by the innocent party after probable knowledge of the matrimonial offence having marital intercourse with the guilty.² It was a term commonly used in the Ecclesiastical Court; but although the argument frequently turned as to what amounted to condonation, no exact definition was ever given, and it was used in the Matrimonial Causes Act, 1857, as if perfectly understood.³

So in an early case soon after this Act, Lord Campbell, Chief Justice, presiding over the full Court of Divorce, held that condonation could only be constituted by reconciliation, followed, not necessarily by sexual intercourse, which might be inapplicable, but by conjugal cohabitation, so that the guilty spouse is restored to his or her former position as a *spouse*, though it may be a degraded spouse without his or her former privileges.³ And condonation has the same meaning under the Matrimonial Causes Act, 1857, as it had previously in the Ecclesiastical Courts.⁴ There should be added to the

¹ Sanchez, bk. x., disp. 5, No. 19 and seq.; but Lord Campbell, C. J. (see *supra*), in the full Court of Divorce declined to adopt and follow the definitions of Canonists and Civilians.

² Oughton, tit. 214.

³ *Keats v. K.* (1859), 1 Sw. & Tr., 334.

⁴ *Dent v. D.* (1865), 4 Sw. & Tr., 105.

above description of condonation, first, that the condonation must, as to an offence of which ignorance is possible, be knowing; and secondly, as regards the wife, that it must be free, *i.e.*, she must not be constrained to cohabitation. Bound up with the doctrine of condonation is the consideration of the proper conduct of the injured or suspicious spouse towards the offender.

Condonation may be "express" or "implied," but condonation is usually implied; and it is as to what conduct implies condonation that the chief difficulties arise.

Express condonation is constituted by an agreement not to sue (see *post* (g), p. 284); and, as Lord Penzance said, where

"The parties have entered into a written agreement, whatever ground there may be for saying that the wife forgave the husband must be found in the agreement, which supersedes any presumption of law; and the conduct of the parties must be referred to that agreement.¹"

Such express condonation by written agreement is final, and not liable to revive,² unless it is expressly made conditional.¹ But a mere verbal "pardon" and "forgiveness" standing alone will rarely amount to condonation.³ Lastly, express condonation bars the remedy even for unknown prior offences, see *post* (g), *aliter* as to implied condonation.

Implied condonation, which is much the most usual and difficult to prove, is exemplified by the following instances of what is condonation as against husband or wife.

Knowledge essential to Condonation.—As against either, however, the condonation must be with knowledge of

¹ *Newsome v. N.* (1871), L. R., 2 P. & M., 306.

² *Rose v. R.* (1883), 8 P. D., 98, C. A.

³ *Keats v K.* (1859), 1 Sw. & Tr., 334, by the full Court.

the offence. Soon after the Matrimonial Causes Act, 1857, the Judge Ordinary laid down that condonation is forgiveness of matrimonial offence, with full knowledge of all its particulars.¹ It seems doubtful, however, whether, if a husband or wife has committed adultery with A. and B., and subsequently the innocent party, knowing of the adultery with A., condones it, such innocent spouse can on subsequently becoming aware of the adultery with B., obtain a decree against the guilty spouse in respect of such adultery which was prior to the condonation, but then unknown.² Therefore reasonable knowledge, *probabilis scientia*, of the matrimonial offence, derived either from voluntary confession by the guilty party or credible information, followed by cohabitation, is condonation; the question being whether or not the condoning party believed the information he had received.³ Lastly, condonation is always conditional on the guilty party not committing a matrimonial offence in the future; but apparently other conditions may be imposed by the innocent spouse on returning to cohabitation, on breach of which the effect of condonation is destroyed.⁴

A suit for restitution of conjugal rights may amount to condonation; and at all events it is inconsistent with a

¹ *Peacock v. P.* (1858), 1 Sw. & Tr., 183; and see *Oughton*, tit. 214; and see generally, *Snow v. S.* (1842), 2 N. of C., sup. 1; *Turton v. T.* (1830), 3 Hag. Ec., 338, p. 351; *Bramwell v. B.* (1831), *ib.*, 618, p. 629.

² *Dempster v. D.* (1861), 2 Sw. & Tr., 438, where the previous cases are reviewed.

³ *Ellis v. E.* (1865), 4 Sw. & Tr., 154; and see *Keats v. K.* (1859), 1 Sw. & Tr., 334, p. 346; *Best v. B.* (1823), 1 Add., 411, p. 439 and seq.; *Dillon v. D.* (1842), 3 Curt., 96, pp. 112, 113; *Dobbyn v. D.* (1817), Pointer on Divorce, 233, n. As to willingness to believe information against wife, see Lord Penzance's judgment, quoted *post*, p. 308.

⁴ *Cooke v. C.* (1863), 3 Sw. & Tr., 126, 246; *Keats v. K.* (1859), 1 Sw. & Tr., 334, p. 357, *aliter* in Scotch Law; *Collins v. C.* (1884), 9 App. Ca., 205.

charge of cruelty, as it shows that there is no apprehension of personal violence.¹

The husband sleeping with the wife after discovery of her adultery always, as against him, amounts to condonation.²

Proper Conduct of a Husband who suspects his Wife.—As soon as a husband has full knowledge and proof of adultery by his wife, he must instantly separate from her; but he may only have suspicions. As to this, Lord Stowell laid down—

“A husband has suspicions, he has some intimations, he has enough to convince his own mind, but not to instruct a legal case. In that distressing interval his conduct is nice, and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated; and if he continues cohabitation, it then becomes liable to that species of imputation which has proved to the disadvantage of this gentleman.”³

Meanwhile, although

“A husband is not barred by a mere permission of opportunity for adultery, nor is it every degree of inattention on his part which will bar him of relief, but it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of the wife take its full scope, but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution.”⁴

In this case Lord Stowell quoted Sanchez to show that a husband, although he may not tempt, may watch his

¹ *Evans v. E.* (1843), 2 N. of C., 470; and *Neeld v. N.* (1831), 4 Hag. Ec., 263, p. 268; but see *Wilson v. W.* (1849), 6 Moore P. C., 484.

² *Timmings v. T.* (1792), 3 Hag. Ec., 77; *Winscom v. W.* (1864), 3 Sw. & Tr., 380; and see p. 278; *aliter* as to wife, see p. 279.

³ *Elwes v. E.* (1796), 1 Hag. Con., 269.

⁴ *Timmings v. T.* (1792), 3 Hag. Ec., 76; Sanchez, bk. x., disp. 12, No. 52, commented on *Phillips v. P.* (1844), 3 N. of C., 444, pp. 481, 482; and see *Reeves v. R.* (1813), 2 Phillim., 125. But this dictum of Lord Stowell, that the husband may “let the licentiousness of the wife take its full scope,” was strongly disapproved by Lord Westbury, L. C., in the House of Lords; *Gipps v. G.* (1864), 11 H. L. C., 1, p. 20.

wife.¹ As to watching by detectives, see *post*, 4 (*f*), pp. 303, 304, and 5 (*a*), p. 308.

Where a husband once knows of his wife's misconduct he should immediately refrain from sleeping with her, even if he does not expel her from house forthwith.²

If a husband, after receiving probable information from others, or confession of a guilty passion from a wife, still, although leaving her bed, hesitates a while before expelling her and seeking a divorce, meditating whether he could pardon and reform her, there is nothing wrong in this, and he is not barred.³

Great facility of condonation and repeated reconciliations show insensibility to injury, and almost amount to licence to future adultery,⁴ and induces the Court to scrutinise the petitioner's conduct with jealousy.⁵

It is a proper course for a husband on receiving information which he believes of his wife's adultery, to communicate with her relations. Communication with her relations being given in evidence at the trial always redounds well to the husband, whatever the issue of the trial. For on being expelled from the husband's house, it is open to her relations, if they believe in her innocence, to receive her; and it cannot be said that the husband sent her off to, and she had to put herself under, the protection of the co-respondent. If the relations do not receive her, it shows that they believe in her guilt and approve the husband; and if in a trial between

¹ See previous note.

² *Dillon v. D.* (1842), 3 Curt., 86, p. 113; *Best v. B.* (1823), 1 Add., 411; Oughton, tit. 214, sec. 5; and see p. 277.

³ *Hoar v. H.* (1801), 3 Hag. Ec., 137, p. 141; *Stone v. S.* (1844), 3 N. of C., 278, p. 307.

⁴ *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, p. 113; *Timmings v. T.* (1792), 3 Hag. Ec., 76.

⁵ *Dunn v. D.* (1817), 2 Phillim., 403.

husband and wife her relations take the side of and approve the husband, his conduct will usually be approved of by the Court and public opinion.

Implied Condonation as against the Wife.—Condonation is not so readily presumed as a bar against the wife 'as against the husband.¹

"She may have a difficulty either in quitting the house or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife. A woman may submit to necessity. It is too hard to term submission mere hypocrisy."²

As regards cruelty which consists of a series of acts, condonation is not to be lightly presumed from a continuance of cohabitation after one or several acts. Also the continuance may be obtained by the apprehension of some greater evil, *e.g.*, privation of children, and their removal abroad by a harsh and excited father. Also the mere accompanying a husband to America does not necessarily condone the previous acts.³

As against a petitioning wife, marital intercourse with her husband subsequent to the matrimonial offence does not necessarily amount to condonation.⁴

An unwilling acquiescence by the wife to live in the same house, but without connubial cohabitation, is not condonation;⁵ for although when husband and wife live in

¹ See *Durant v. D.* (1825), 1 Hag. Ec., 733, p. 752; *D'Aguilar v. D'A.* (1794), 1 Hag. Ec., 773, p. 786; *Beeby v. B.* (1799), 1 Hag. Ec., 789.

² *Beeby v. B.* (1799), 1 Hag. Ec., 789; and see *Sant v. S.* (1874), L. R., 5 P. C., 542.

³ *Curtis v. C.* (1858), 1 Sw. & Tr., 192, p. 200; and see *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, p. 113, Sir John Nicholl; and see *Sant v. S.*, *ubi sup.*

⁴ *Newsome v. N.* (1871), L. R., 2 P. & M., 306, p. 311, Lord Penzance.

⁵ *D'Aguilar v. D'A.* (1794), 1 Hag. Ec., 773, p. 782; and see *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, p. 118.

the same house they are presumed to cohabit matrimonially, this presumption may be rebutted.¹

Lastly, cohabitation obtained by force or fraud could never amount to condonation.²

Reviver.—Although condonation implies forgiveness, yet it only implies “forgiveness of a peculiar character,” because it is coupled with the condition that the husband shall not in future be guilty of any marital offence;³ condonation, accordingly, is never final,⁴ but always conditional.⁵ This condition of good conduct in the future is always implied in condonation, but it may be expressly inserted;³ but in a final condonation by agreement not to sue, the condition of reviver will not be implied,⁶ unless it is expressly inserted.

The effect of reviver is that the petitioner can complain as well of the previous condoned offences as of the subsequent offences.

Proper Conduct of Wife if Husband is adulterous.—

“Forgiveness on the part of a wife, especially with a large family, in the hope of reclaiming her husband, is meritorious, while a similar forgiveness on the part of the husband would be degrading or dishonourable.”⁷

But repeated forgiveness shows insensibility to the injury;⁸ and a wife would not be justified in living in the

¹ *Beeby v. B.* (1799), 1 Hag. Ec., 789, p. 796.

² *Snow v. S.* (1842), 2 N. of C., sup. 1, p. 15.

³ *Newsome v. N.* (1871) L. R., 2 P. & M., 306; *Durant v. D.* (1825), 1 Hag. Ec., 733, p. 761; *aliter* in Scotch Law, *Collins v. C.* (1884), 9 App. Ca., 205.

⁴ *Rose v. R.* (1883), 8 P. D., 98, C. A., Jessel, M. R.

⁵ *Blanford v. B.* (1883), 8 P. D., 19; *Dent v. D.* (1865), 4 Sw. & Tr., 105; *Moore v. M.* Times, 1892, July 16, p. 16.

⁶ *Rose v. R.*, *ubi sup.*; and see *post* (g), p. 284.

⁷ *Durant v. D.* (1825), 1 Hag. Ec., 733, p. 752, Sir John Nicholl; *Beeby v. B.* (1799), 1 Hag. Ec., 789, p. 793, Lord Stowell; *Ferrers v. F.* (1791), 1 Hag. Con., 130.

⁸ *Snow v. S.* (1842), 2 N. of C., 1, p. 15.

same house with her husband's concubine, sharing the turpitude of his crime and partaking a polluted bed ;¹ also when the husband commits incest with the wife's sister, the wife will not be barred by a certain forbearance to prevent a scandal.²

Proper Conduct of Wife if Husband is cruel.—

“It is not, however, necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct. It is legal and meritorious in her to submit to no inconsiderable degree of ill-treatment ; to be patient as long as possible. Such forbearance is not permitted to weaken her title to relief.”³

Reverter.—The condition is the same in all condonation, namely, that the husband or wife shall not be guilty of adultery or any other matrimonial offence.

So if the husband has been guilty of incestuous adultery which is condoned, and subsequently commits adultery not incestuous, the former incestuous adultery is revived, and the wife can sue for dissolution.⁴

Adultery revives cruelty and cruelty revives adultery ; and if a husband has been guilty of adultery and desertion which is condoned, and subsequently commits adultery ; the previous desertion and adultery is revived, and the wife can sue for dissolution.⁵

Slighter acts of cruelty than would have sufficed for an original suit will revive condoned cruelty.⁶

¹ *Kirkwall v. K.* (1818), 2 Hag. Con., 277.

² *Turton v. T.* (1830), 3 Hag. Ec., 338 ; and see *Newman v. N.* (1870), L. R., 2 P. & M., 57.

³ *Popkin v. P.* (1794), 1 Hag. Ec., 765, n., Lord Stowell ; and see *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, p. 113, Sir John Nicholl ; *Simmons v. S.* (1847), 5 N. of C., 324, p. 331.

⁴ *Newsome v. N.* (1871), L. R., 2 P. & M., 306.

⁵ *Blandford v. B.* (1883), 8 P. D., 19 ; and see *Palmer v. P.* (1860), 2 Sw. & Tr., 61 ; *Furness v. F.*, *ib.*, p. 63 ; *Durant v. D.* (1825), 1 Hag. Ec., 733, pp. 762 and seq.

⁶ *Cooke v. C.* (1863), 3 Sw. & Tr., 126, 137 ; *Durant v. D.* (1825), *ubi sup.*, p. 765.

Also it is thought that acts of levity and impropriety short of actual adultery will revive condoned adultery.¹

(e) *Counter-charge*

The Court is bound to see into any counter-charge made against the petitioner;² but such counter-charge only constitutes a discretionary bar; see *post*, s. 4, pp. 286–304.

(f) *Collusion*

Collusion between the petitioner and the respondent is made an absolute bar to a decree being granted, and upon proof thereof it is incumbent on the Court to dismiss the petition.³

“Collusion will deprive a petitioner of a decree, independently of the question whether or not the Court finds that the petitioner has been guilty of a matrimonial offence.”⁴

Collusion may exist without connivance, but connivance usually implies collusion.⁵

As to what is collusion, Lord Penzance declined to define or describe it, but said—

“That where, as in this case, the husband has promised the wife to commit adultery in order that she may obtain a divorce, and she has consented, as I find she has done, to take the course indicated to her by her husband, namely, that of watching him in order to obtain evidence of his adultery, and where the adultery charged has been committed with that understanding between the parties, and the evidence has been obtained by that means, it is impossible to say that the parties have not been colluding together and playing into one another’s hands

¹ *Winscom v. W.* (1864), 3 Sw. & Tr., 380; *aliter* in Scotch Law, *Collins v. C.* (1884), 9 App. Ca., 205.

² 20 & 21 Vict., c. 85, s. 29; *Lautour v. The Queen’s Proctor* (1864), 10 H. L. C., 685.

³ 20 & 21 Vict., c. 85, ss. 30, 31; and see *F. v. F.* (1860), 1 Sw. & Tr., 598.

⁴ *Butler v. B.* (1890), 15 P. D., 66, C. A.

⁵ *Crewe v. C.* (1800), 3 Hag. Ec., 123, p. 129 and seq.; and see *ante* (c), pp. 268, 269.

in presenting the petition and prosecuting the suit. Having come to this conclusion, it is my duty to dismiss the petition.”¹

So where by agreement between the parties the matter is not fully brought before the Court, that is collusion.²

The mere fact of a petitioning husband giving money to his wife before and after the institution of the suit is not collusion, for there is no impropriety in a husband making his wife a reasonable allowance while the suit is pending, in order to save the expenses of an application to the Court for alimony.³

Where the petitioning husband's costs are paid by the respondent wife's father, this has been held collusion.⁴

The fact of a respondent wife who had not appeared, coming into Court for the purpose of identification and receiving therefor £1 from the petitioner's solicitor, was held, though with some expressions of doubt as to such communications between the petitioner's solicitor and the respondent, not to amount to collusion.⁵

When the petitioning husband not merely paid money by way of alimony, *pendente lite*, to the wife, but also said to her—

“If you don't oppose, I shall get a divorce cheaper than if you do ; therefore keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent,”

this was held to be collusion.⁶

¹ *Todd v. T.* (1866), L. R., 1 P. & M., 121.

² *Butler v. B.* (1890), 15 P. D., 66, C. A.

³ *Barnes v. B.* (1867), L. R., 1 P. & M., 505.

⁴ *Lloyd v. L.* (1859), 1 Sw. & Tr., 567.

⁵ *Harris v. H.* (1862), 4 Sw. & Tr., 232 ; personal and private interviews between the petitioner's solicitors and the respondent are jealously scanned ; *Jones v. J.* (1847), 5 N. of C., 134, pp. 137-141.

⁶ *Barnes v. B.* (1867), L. R., 1 P. & M., 505.

(g) *Agreement not to sue*

Separation deeds, though not mentioned in the Matrimonial Causes Act, 1857, as creating bar, yet as by the course of decisions they are now considered valid, will, when they contain a covenant that neither party will sue or molest the other, preclude either party from petitioning in respect of any matrimonial offence, whether known or concealed, committed previous to such agreement; not even if there is subsequent misconduct will the previous offence be "revived," for it is a "final condonation" by express bargain, and the condition of reviver and future good conduct always implied in condonation will not be implied into such deed or agreement¹ unless expressly inserted.²

Such separation deed is not a licence to commit adultery, and for any subsequent offence the petitioner is not estopped from suing³ unless such separation deed amount to connivance, when the petitioner would, of course, be barred.⁴

It used to be considered that a separation deed prevented a husband from recovering damages against an adulterer; but in a recent case where the respondent, an opera bouffe singer, subsequent to the execution of the

¹ *Rowley v. R.* (1866), L. R., 1 H. L., Sc. & D., App. 63; *Stanes v. S.* (1877), 3 P. D., 42; *Rose v. R.* (1883), 8 P. D., 98, C. A.; as to condonation and reviver, see *ante* (d), pp. 272, 275. A separation deed without a covenant not to sue, and not amounting to condonation, will not be a bar; *Moore v. M.* (1887), 12 P. D., 193; and see *Brown v. B.* (1874), L. R., 3 P. & M., 202, when a wife was granted relief for cruelty, notwithstanding a subsequent separation deed; and see Chap. V, p. 220; Chap. VIII, s. 2 (d); and Chap. X, s. 1 (b), and see pp. 200, 259, 272, 275, 339.

² *Newsome v. N.* (1871), L. R., 2 P. & M., 306.

³ *Morrall v. M.* (1881), 6 P. D., 98; *Gandy v. G.* (1882), 7 P. D., 77, 168, C. A.

⁴ *Ross v. R.* (1869), L. R., 1 P. & M., 734; see *ante* (c), pp. 268, 271, 272, as to connivance.

separation deed, committed adultery with the lessee of the theatre at which she sang, the petitioner recovered £5000 damages; because, as the Court charged the jury, co-respondent was the cause of the separation on which the deed was executed.¹

As regards desertion, past and future, the separation deed estops the petitioner obtaining relief, whether by way of restitution of conjugal right (see Chap. X, s. 1) or by way of dissolution or judicial separation (see *post*, 5 (d), p. 339).

(h) *Estoppel*

Estoppel² is not mentioned in the Matrimonial Causes Act, 1857, as a bar; but on general juristic principles the Court regards this as a bar.

“According to the practice of every Court, after a matter has once been put in issue and tried, and there has been a finding or a verdict on that issue, and thereupon a judgment, such finding and judgment is conclusive between the same parties on that issue. In all Courts it would be treated as an estoppel.”

In this case a wife had petitioned for judicial separation on the ground of cruelty; the Court found it was not proved, and dismissed the petition. Subsequently the wife petitioned for dissolution of marriage on ground of adultery, coupled with the same identical charges of cruelty as were alleged in the previous suit; but it was held that she was estopped from setting up the same charges of cruelty.³

A verdict by a jury in a previous suit against the petitioner finding adultery or, it would appear, any other facts constituting an absolute or discretionary bar, is, if

¹ *Izard v. I.* (1889), 14 P. D., 45; and see *ante*, pp. 258, 259.

² For definition of Estoppel, see *ante*, Chap. III, p. 130, n. 1.

³ *Finney v. F.* (1868), L. R., 1 P. & M., 483; and see *Sopwith v. S.* (1860), 2 Sw. & Tr., 160; *Robinson v. R.* (1877) 2 P. D., 75; and *Carnegie v. C.* (1886), 17 L. R. Ir., 430, C. A.; and *post*, pp. 288, 296.

not an estoppel, conclusive evidence against the petitioner in any subsequent matrimonial suit.¹

A previous suit for nullity by the petitioner grounded on the respondent's alleged impotence, which failed, is no bar to a petition for dissolution by the same spouse on account of the respondent's adultery.²

SEC. 4.—DISCRETIONARY³ BARS

(a) *Generally*

“Provided always that the Court shall not be bound to pronounce such decree (for dissolution of marriage) if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.”⁴

A duty is thrown on the Court to form an *opinion*, first, as to whether the petitioner has been guilty of what constitutes a discretionary bar; and secondly, if so, whether it is of such a nature that the petitioner ought not to have a decree.⁵ But the Court usually follows the opinion of the jury; but if the jury disagrees, it will decide it itself.⁶ As to the exercise of this discretion, it

¹ *Conradi v. C.* (1868), L. R., 1 P. & M., 391, 514.

² *Ditchfield v. D.* (1869), L. R., 1 P. & M., 729; and see *ante*, pp. 219, 220.

³ The word “discretion” is now usually employed as to these bars, though in the House of Lords, Lord Westbury, L. C., complained of it as not representing the words of section 31 quoted *supra*, “the Court shall not be bound.” See *Lautour v. Q. P.* (1864), 10 H. L. C., 685, p. 698.

⁴ 20 & 21 Vict., c. 85, s. 31.

⁵ *Dering v. D.* (1868), L. R., 1 P. & M., 531; and see *Barnes v. B.* (1868), *ib.*, 572; *Conradi v. C.* (1868), *ib.*, 514.

⁶ *Narracott v. N.* (1864), 3 Sw. & Tr., 408; and see *ante*, p. 248, as to effect of a verdict.

is almost always exercised adversely to the petitioner, and the petition dismissed, unless the petitioner can make out a very strong case; in fact, it is the rule to refuse the decree, and to grant it is the exception,¹ and only done under special circumstances.²

Lord Penzance, J. C., declared as to the exercise of this discretion—

“In cases where the adultery of, has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner’s adultery, being under the whole circumstances of each case more or less pardonable or capable of excuse. A loose and unfettered discretion of this sort upon matters of such grave import is a dangerous weapon to entrust to any Court, still more to a single judge. Its exercise is likely to be the refuge of vagueness in decision, and the harbour of half-formed thought. Under cover of the word ‘discretion’ a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed, and sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices favourable or otherwise to the person whose conduct is under review, which the course of evidence has evoked. Upon such materials so used, two minds will hardly ever form a judgment alike, and the same mind will often appear to others to form contradictory judgments on what seem to be similar facts. This invites public criticism, and shakes public confidence in the justice of the tribunal. I hold, therefore, that the discretion to be exercised under the 31st section of the statute should be a regulated discretion, and not a free option subordinated to no rules. It was probably reposed in the Court because the Legislature found it impossible to foresee and specify the classes of cases fit for its application which might arise under the new law. The duty of reducing its exercise to method devolves upon the Court. Past experience has already pointed out some classes of cases to which it is fitly applied, and the future may probably furnish more.”³

And Lord Hannen, then J. O., said the Court was not bound to act on what the Ecclesiastical Courts formerly acted⁴

¹ *Barnes v. B.* (1868), L. R., 1 P. & M., 572.

² *Stoker v. S.* (1889), 14 P. D., 60.

³ *Morgan v. M.* (1869), L. R., 1 P. & M., 644.

⁴ *M'Cord v. M'C.* (1875), L. R., 3 P. & M., 237.

(b) Adultery

Adultery on the part of the petitioner creates a discretionary bar.¹

Adultery "during the marriage" includes adultery subsequent to the decree *nisi* and before the decree absolute; so if the petitioner obtaining the decree *nisi* commits adultery, there can be intervention resulting in the decree being reversed.²

If the petitioner has once been found guilty of adultery in a matrimonial suit, that finding is conclusive; and that finding being given in evidence by the respondent or the Queen's Proctor, the Court or jury can find the petitioner guilty of adultery without further evidence.³

As to proof of adultery, see *post*, 5 (b), p. 309; but when the Queen's Proctor intervenes to prove adultery, the burden of proof is not so strict against that official, as the petitioner is bound to refute a *prima facie* case made out.⁴

When the respondent makes such counter-charge of adultery, the question of the petitioner's adultery may be reserved altogether for a rebutting case after the respondent's witnesses have been called. In this case the petitioner can first give his evidence against the respondent, and be cross-examined thereon, without being

¹ 20 & 21 Vict., c. 85, s. 31; as to adultery being a bar to judicial separation, see Chap. VIII, s. 2 (a).

² *Hulse v. H.* (1871), L. R., 2 P. & M., 259; and also includes adultery after a decree of divorce *a mensa et thoro*; *Lautour v. Q. P.* (1864), 10 H. L. C., 685; and see *post*, 5 (b), pp. 309, 313.

³ *Conradi v. C.* (1867), L. R., 1 P. & M., 391 and 514; as to the converse case, whether a finding in a party's favour precludes by way of *res judicata*, the same charges being ever again raised around him or her, see *Robinson v. R.* (1877), 2 P. D., 75; and see *ante*, Estoppel, p. 285.

⁴ *Hulse v. H.* (1872), L. R., 2 P. & M., 357.

asked any questions as to the charge of adultery against himself or herself, and then at the close of the respondent's evidence the petitioner may be recalled, and other witnesses called to the charge of adultery against the petitioner.¹

As to the exercise of the discretion, assuming the adultery is proved, in these cases Lord Penzance, J. C., observed, the question is—

“To what extent ought this Court to exercise a discretion in granting or withholding a decree to petitioner, who has himself been found guilty of adultery. There is no doubt, I think, that the Legislature has invested this Court with a discretion on the subject; and there is equally no doubt that there are cases, in which the adultery of the petitioner has been committed, that ought not in justice to stand in the way of a decree.”²

But “the instances in which the Court has pronounced a decree for the dissolution of a marriage, notwithstanding the adultery of the petitioner, are very rare.”³

There are two classes of cases where the Court has exercised its discretion in favour of the petitioner.

Firstly, where the petitioner has married again under the mistaken but *bonâ fide* idea that the respondent was dead,⁴ also where the petitioning husband or wife after obtaining a decree *nisi* in ignorance of the effect of the decree *nisi*, and previous to and without the decree absolute remarried with another man or woman, and cohabited, the Court made the decree absolute notwithstanding the petitioner's adultery, as he or she had acted *bonâ fide*, though ignorantly, and without any intention to commit adultery.⁵

¹ *Jackman v. J.* (1889), 14 P. D., 62.

² *Morgan v. M.* (1869), L. R., 1 P. & M., 644.

³ *M'Cord v. M'C.* (1875), L. R., 3 P. & M., 237, Lord Hannen; and see *Barnes v. B.* (1868), L. R., 1 P. & M., 572.

⁴ *Joseph v. J.* (1865), 34 L. J., P. & M., 96; approved *Morgan v. M.* (1869), L. R., 1 P. & M., 644; *M'Cord v. M'C.* (1875), L. R., 3 P. & M., 237; and *Freegard v. F.* (1883), 8 P. D., 186.

⁵ *Noble v. N.* (1869), L. R., 1 P. & M., 691; *Wickham v. W.* (1880), 6 P. D., 11; *Moore v. M.*, Times (1892), July 16, p. 16; and see *ante*, Chap. II, p. 34.

Secondly, where a petitioning wife has been driven into prostitution by her husband. In this case a wife petitioned for dissolution on account of her husband's cruelty and adultery, which were proved. It was also proved that the petitioner had been coerced by the respondent into leading a life of prostitution, he taking the money she obtained by prostitution. After eight months of this life, during which she was continually ill-treated by the respondent, she left him and went to her brother, the prostitution being contrary to her will. The Court, in exercise of its discretion, granted a decree for dissolution notwithstanding the bar of adultery.¹

Thirdly, in case of condonation of the petitioner's adultery by the respondent. This alone will not suffice to induce the Court to exercise its discretion in the petitioner's favour; he does not thereby become *rectus in curia*.² In this case the petitioner had married an actress, and previous to the marriage he had cohabited with Janet Bunn, which was previously intimated to the respondent. On one occasion since marriage, the said Janet Bunn having frequently gone after the petitioner, he committed adultery with her, which the respondent after finding out pardoned, and cohabited with the petitioner. Still the Court refused to exercise its discretion in the petitioner's favour, although as to his adultery it was shown that the act was isolated, had been

¹ *Coleman v. C.* (1866), L. R., 1 P. & M., 81; approved *Morgan v. M.* (1869), *ib.*, p. 644; *M'Cord v. M'C.* (1875), L. R., 3 P. & M., 237.

² *M'Cord v. M'C.*, *ubi sup.*, Lord Hannen, overruling Lord Penzance's dictum in *Morgan v. M.* (1869), L. R., 1 P. & M., 644, and the decision of the Ecclesiastical Court delivered by Dr. Lushington; *Anichini v. A.* (1839), 2 Curt., 210, 218. The dictum of Jessel, M. R., to the contrary, in *Rose v. R.* (1883), 8 P. D., 98, C. A., has never been followed, and cannot be considered law. As to condoned adultery being a bar to judicial separation, see Chap. VIII, s. 2 (a).

condoned by the respondent, and in no way conduced to her guilt.¹

And where the petitioning husband had been guilty of adultery with one of the servants five years previous to his wife's adultery, which was proven, and the husband's adultery had been condoned, and was unconnected with the wife's, still, the President, Lord Hannen, refused a decree, saying—

“Now it is perfectly true that the wife—as wives frequently do—forgave her husband. But it is impossible not to feel that, after a man has committed himself in this way, it must have a very serious effect on those feelings in the wife which go far to constitute the safeguards of married life. She would be more likely to fall into error, having the example of her husband before her.”²

But in a case where the wife was the petitioner, it was shown that after the marriage, in 1876, the husband was constantly drunk and ill-treated her. Then in 1880, three years previous to the present suit, the husband had petitioned against her, and, proving adultery, had obtained a decree *nisi*, which was reversed on the intervention of the Queen's Proctor proving gross and notorious criminality against the husband. The husband subsequently cohabited with her for above a month, thereby condoning her adultery; but on his commencing to ill-treat her, she left and went to her mother. He subsequently, as well as committing adultery, was convicted of rape on a girl under twelve years, and sentenced to ten years' penal servitude. The wife petitioned for dissolution by reason of her husband being guilty of cruelty, adultery, and rape;

¹ *M'Cord v. M'C.*, *ubi sup.* The Court observed that the wife (an actress) belonged to a profession in which she was exposed to great temptations; and for a similar dictum see *Calcraft v. Lord Harborough* (1831), 4 C. & P., 499; and *post*, p. 303

² *Story v. S.* (1887), 12 P. D., 196; and see *Stoker v. S.* (1889), 14 P. D., 60.

the Court, notwithstanding her condoned adultery, gave her a decree—

“Having regard to all the circumstances of the present case, and to the position in which the husband is placed by the sentence passed upon him, a sentence which deprives him of the power of fulfilling any of the conjugal obligations, not forgetting, too, that rape is treated for the purpose of the Divorce Acts as a higher conjugal misdemeanour, one of a more heinous nature than mere adultery.”¹

Outside these three classes, in certain instances the Court has exercised its discretion in favour of the petitioner, as in a case where the petitioning husband's adultery was a single isolated act, nowise conducing to the wife's adultery, and her conduct was very flagrant, there being numerous co-respondents, the Court gave a decree notwithstanding the petitioner's adultery.²

(c) *Cruelty*

Cruelty by the petitioner towards the other party to the marriage constitutes a discretionary bar to him or her obtaining relief.³ As to what is cruelty, see *post*, 5 (c), p. 323; but acts falling short of cruelty may amount to desertion, *post* (e), p. 295, or to wilful neglect, *post* (f), pp. 297–304; imprisonment of a spouse is neither desertion by such spouse nor excuse for desertion by the other; see *post*, pp. 341, 348.

Where the jury found cruelty against the petitioner and adultery against the respondent, but it appeared that the wife had drunken habits which were the cause of the husband's cruelty, and, further, that the cruelty had in no wise conduced to the wife's drunkenness and adultery, the Court in its discretion gave a decree.⁴ Cruelty is usually

¹ *Collins v. C.* (1884), 9 P. D., 231.

² *Conradi v. C.* (1868), L. R., 1 P. & M., 514.

³ 20 & 21 Vict., c. 85, s. 31.

⁴ *Pearman v. P.* (1860), 1 Sw. & Tr., 601.

a matrimonial offence committed by a husband, but it may be committed by a wife (see *post*, 5 (c), pp. 325, 326); and in one case the cruelty of a petitioning wife was objected as bar against her, and the petition dismissed.¹ In the Ecclesiastical Courts, cruelty in the petitioner was no bar to a divorce *a mensa et thoro* for adultery (see Chap. VIII, s. 2 (b)); rather the wife "should have sought her remedy in the purity of her conduct, not in the contamination of her person."² Cruelty found against the petitioner in a previous suit is conclusive evidence; see *ante*, pp. 285, 286.

(d) *Delay*

Unreasonable delay by the petitioner in presenting or prosecuting his or her petition is a discretionary bar to relief being granted.³ Facts showing delay may amount to the absolute bar of connivance or condonation; see *ante*, s. 3 (c) (d), pp. 268, 272.

As to what space of time amounts to delay, that depends upon the excuse that can be made; and then, even assuming there is "unreasonable delay," whether the Court will exercise the "discretion" vested in it favourably to the petitioner.

A delay of *two years* unexplained, where the petitioner has been content to let things be, amounts to unreasonable delay creating a bar;⁴ but if the petitioner intends to rely on desertion with adultery, he or she must wait till the desertion has lasted two years.⁵

¹ *Boreham v. B.* (1866), L. R., 1 P. & M., 77.

² *Jones v. J.* (1847), 5 N. of C., 134, p. 143, Dr. Phillimore.

³ 20 & 21 Vict., c. 85, s. 31. Delay was not a bar in the old Ecclesiastical Courts; see Chap. VIII, s. 2 (e).

⁴ *Nicholson v. N.* (1873), L. R., 3 P. & M., 53; and see *Heyes v. H.* (1857), 13 P. D., 11.

⁵ *Knapp v. K.* (1880), 6 P. D., 10; *Blandford v. B.* (1883), 8 P. D., 19; *Farmer v. F.* (1884), 9 P. D., 245.

The bar of the delay is applied more strictly against the husband than against the wife, for "the cases which the Legislature had principally in view were those in which a husband's honour had been wounded, and he had put up with his own disgrace for a length of time. The rule *vigilantibus non dormientibus jura subveniunt* obtained in the Ecclesiastical Courts, and was adopted by the House of Lords."¹

As against a petitioning wife, the bar of delay is less severely enforced. For, even after nineteen years' delay, where a wife, a schoolmistress, separated from her husband in 1850 in consequence of his committing incestuous adultery with her sister, which continued after the separation, and did not petition for dissolution till 1869, and on being examined on the reason of the delay, stated that her mother was very reluctant to have the scandal in the family exposed, and that she yielded to her mother's urgent entreaties, and had taken no step during her mother's life, and immediately on her death had presented this petition; the Court, while holding that there was "unreasonable delay," yet in the circumstances of the case exercised its discretion in the petitioner's favour and gave a decree for dissolution.²

As might have been expected, where a wife delayed for *twenty years* after a separation to sue for dissolution, she was held barred.³ But, curiously enough, there is no absolute limit of time in point of law.

Excuses for Delay.—The poverty of the petitioner is frequently accepted as an excuse. But poverty is a relative term; and in a case where the husband, who was

¹ *Newman v. N.* (1870), L. R., 2 P. & M., 57, 58.

² *Newman v. N.* (1870), L. R., 2 P. & M., 57; and see *Turton v. T.* (1830), 3 Hag. Ec., 338.

³ *Beauclerk v. B.* (1891), P., 189, C. A.

a coal-hauler, and had been a constantly prosperous man, and possessed stock-in-trade to the extent of £600, nine horses, and several cottages, had delayed petitioning for *fourteen years*, the Court refused a decree on the ground of unreasonable delay.¹

So where a wife abstains from proceeding with a sincere wish to give her husband a chance of reforming, this has been accepted as an excuse. In this case the husband having been guilty of cruelty and adultery in 1867, the wife sued for judicial separation only, which was granted in 1868. In 1872 she petitioned for dissolution, the husband having continued to live in adultery. The wife stated that the reason why she did not ask for dissolution in the first instance was that she loved her husband, and hoped his heart would change; but that finding that he was now living in adultery with another woman, she had abandoned the hope of his reformation and desired the dissolution of her marriage. The Court believing this, and that the present suit was *bonâ fide* instituted in consequence of past adultery, and considering her motives meritorious, exempted her from the suspicion of unreasonable delay, and granted a dissolution.²

But an excuse by the wife for twenty years' delay, that she did not wish to proceed till her only child, a *son*, had grown up and she could ascertain his wishes, was held insufficient by the Court of Appeal, and the wife declared barred.³

(e) *Desertion*

“If the petitioner shall, in the opinion of the Court, have been guilty . . . of having deserted or wilfully separated himself or herself from

¹ *Short v. S.* (1874), L. R., 3 P. & M., 193.

² *Green v. G.* (1873), L. R., 3 P. & M., 121; and see an exactly similar case, *Mason v. M.* (1883), 8 P. D., 21, C. A., where the husband was the petitioner.

³ *Beauchlerk v. B.* (1891), P., 189, C. A.

the other party before the adultery complained of, and without reasonable excuse,"

this causes a discretionary bar.¹

So where a husband proved against his wife adultery which occurred in 1866, but she proved that she had obtained against him in 1868 a judicial separation for desertion on his part, beginning in 1856, and therefore previous to the adultery complained of, the Court refused a decree for dissolution, saying—

"Nothing is more likely to conduce to adultery than throwing a young wife on the world without the protection of her husband; a desertion without excuse before the adultery complained of is therefore in my opinion a strong reason for withholding a decree."²

If, however, the desertion by the petitioner has clearly not conduced to the respondent's adultery, the Court has granted a decree.³

In another case the petitioning wife at the age of sixteen had been entrapped into a marriage with the respondent, who was a French master, aged thirty-six, without her parents' knowledge. When she came home

¹ 20 & 21 Vict., c. 85, s. 31. As to what is desertion without reasonable excuse, see *post*, 5 (*d*), p. 337; though it does not appear that the desertion to act as a discretionary bar need amount to two years' desertion, see *post*, *ib.*; a separation not amounting to desertion may yet amount to wilful neglect and misconduct conducing to the adultery, see (*f*), p. 297. Malicious desertion was not a bar in the old Ecclesiastical Courts, *Morgan v. M.* (1841), 2 Curt., 679, p. 691; *Clowes v. C.* (1845), 4 N. of C., 1, p. 12; see also Chap. VIII, s. 2 (*c*), although then, and therefore now, it might tend to prove connivance.

² *Yeatman v. Y.* (1870), L. R., 2 P. & M., 187; and see *Heyes v. H.* (1887), 13 P. D., 11; *Jeffreys v. J.* (1864), 3 Sw. & Tr., 493.

³ *Williamson v. W.* (1882), 7 P. D., 76. In this case the respondent wife had been imprisoned, and on leaving gaol went into domestic service, then asked her husband to take her back, which he refused on the ground of her being a criminal (which refusal was unjustifiable, see *post*, 5 (*d*) p. 348); she then went back to service and subsequently committed adultery; and see *Davies v. D.* (1863), 3 Sw. & Tr., 221, where husband and wife, servants, were in different houses, and the petitioner had a decree.

from the church to the parents crying, and told them of it, they inquired about the husband, and finding he was not suitable for her separated them and sent her abroad. They never cohabited, and the respondent committed bigamy. The Court, whether thinking that the petitioner's being entrapped was a reasonable cause for desertion, or in the exercise of their discretion, gave her a decree.¹

But in another case desertion was held a bar as against a petitioning wife.²

(f) *Wilful Neglect or Misconduct conducing to Adultery*

"If the petitioner shall, in the opinion of the Court, have been guilty of such wilful neglect or misconduct as has conduced to the adultery," . . .

this constitutes a discretionary bar.³

"Inofficious" conduct by petitioner was also considered in the Ecclesiastical Courts.⁴ But it may be that the facts set up as wilful neglect, etc., may amount to connivance, 3 (c), p. 268, or cruelty, 4 (c), p. 292, or desertion, 4 (e), p. 295.

"Desertion" will usually amount to wilful neglect and misconduct conducing to the adultery;⁵ but desertion is a separate bar, see *ante* (e), p. 295. Separation falling short of desertion⁶ may, however, constitute wilful neglect and misconduct conducing to the adultery.⁷ Still the imprisonment of the petitioner is no excuse for the re-

¹ *Du Terreaux v. Du T.* (1859), 1 Sw. & Tr., 555; and see the similar circumstances of *Beavan v. B.* (1862), 2 Sw. & Tr., 652, *post* (f), p. 299.

² *Boreham v. B.* (1866), L. R., 1 P. & M., 77.

³ 20 & 21 Vict., c. 85, s. 31.

⁴ *Forster v. F.* (1790), 1 Hag. Con., 144; and see *Harris v. H.* (1829), 2 Hag. Ec., 376, p. 413.

⁵ *Ousey v. O.* (1874), L. R., 3 P. & M., 223, where desertion was given in evidence as and held a bar under this head; also see the facts set out *post*, 5 (d), pp. 348, 349.

⁶ As to what is desertion, and the cases showing that separation is not desertion, see *post*, 5 (d), p. 337.

⁷ *Hawkins v. H.* (1885), 10 P. D., 177.

spondent's adultery. This has been decided by the full Court of Divorce in a very hard case. The petitioner was in the Post Office, and the respondent wife a woman of good education and respectable connections. A year after the marriage he was condemned to ten years' transportation. He had no means to support her, and she was supplied with means by her own family. An affectionate correspondence was carried on, and she endeavoured to obtain his pardon. But after three years' good behaviour, she, while living alone in Essex, became the co-respondent's mistress, and had a child. The full Court of Divorce held that although but for the petitioner's absence the adultery would not have taken place, yet that it did not amount to wilful neglect as regards the respondent, and that the petitioner was entitled to a decree.¹

But in certain circumstances mere separation may constitute a bar against the petitioner. Especially if a man marries his mistress or a common prostitute, he is bound to afford her the more care and protection.²

"It has sometimes been supposed that if a man chooses to marry an immodest woman, he cannot afterwards free himself from her by reason of her unchastity. But there is no such law. Whatever the previous life of a woman may have been, she binds herself by marriage to chastity, and if she break the conditions of marriage, her husband is entitled to claim its dissolution. But, on the other hand, a husband is at all times bound to accord to his wife the protection of his name, his home, and his society, and is certainly not the less so where the previous life of his wife renders her peculiarly accessible to temptation. No man is justified in turning his wife from his house without reasonable cause, and then claiming a divorce on account of the misconduct to which he has by so doing conduced. And this I am of opinion the petitioner did. . . . In this case a young man married a woman of loose character, with whom he had lived for nine months previously. After a short time they dis-

¹ *Cunnington v. C.* (1859), 1 Sw. & Tr., 475.

² *Baylis v. B.* (1867), L. R., 1 P. & M., 395; *Dillon v. D.* (1842), 3 Curt., 86, pp. 97 and 110; *Graves v. G.* (1842), 3 Curt., 235; and see p. 299, as to marriage with a prostitute; and see *Hawkins v. H.* (1885), 10 P. D., 177, per Lord Hannen, as to antenuptial seduction by petitioner.

agreed about money. He accused her of extravagance, and she him of parsimony. At last he broke up the house, sold his furniture, and told his wife she must go and live by herself in chambers he had occupied when a bachelor, in Regent Street. As soon as she went there he set a watch over her, and was successful in a very short time in detecting her in adultery. . . . It is hardly to be doubted that he both expected and hoped that she might commit herself. What is this but, in the words of the statute, 'conduct conducing to the adultery'? The petition must be dismissed."¹

But where the petitioning husband was a minor, aged sixteen at the date of the marriage, and the respondent was a prostitute, aged over twenty-eight, and after their marriage he was made a ward of Court, and by order of the Court husband and wife were separated, and the husband's relatives made her no allowance; when a petition was filed by the guardian for the wife's adultery, a decree was granted.² And in the Ecclesiastical Court where there had been a marriage by a minor, who had left the wife or been separated from her, although the Court would have considered the case more favourable if the minor husband's parents had made the wife an allowance, yet the mere withdrawal of such allowance did not bar the husband of his remedy against the adulterous wife.³

Facts not coming up to and constituting, but falling short of, connivance (see *ante*, p. 268), may constitute neglect and misconduct conducing to the adultery.

So in a case where,

"before the adultery complained of, and while the respondent was

¹ *Baylis v. B.* (1867), L. R., 1 P. & M., 395; in this case the petitioner's conduct amounted to desertion without reasonable cause, although it had not amounted to two years' desertion; and see *Hawkins v. H.* (1884), 10 P. D., 177.

² *Beavan v. B.* (1862), 2 Sw. & Tr., 652; and see the similar circumstances of *Du Terreaux v. Du T.* (1859), 1 Sw. & Tr., 555, *ante*, 4 (e), p. 296; and see also *Hill v. Turner* (1737), 1 Atk., 515.

³ *Reeves v. R.* (1813), 2 Phillim., 125, p. 129; *Clowes v. C.* (1845), 4 N. of C., 1, p. 31; *Morgan v. M.* (1841), 2 Curt., 679, p. 689; *Sullivan v. S.* (1824), 2 Add., 299.

residing in the co-respondent's house, the petitioner and the respondent and the co-respondent had been in the habit of going together to places of amusement; that the respondent and co-respondent frequently danced together at those places in the petitioner's presence; that the petitioner frequently went away late at night, leaving the respondent and co-respondent together at these places; and that on two occasions a policeman, who was a friend of the petitioner, had spoken to him as to the imprudence of his conduct, when he remarked that the co-respondent was a good fellow, and would do no harm, and took no further notice;"

and on this evidence Lord Penzance, J. C., gave judgment—

"I am of opinion that although the petitioner was reckless in his conduct, and careless whether his wife committed adultery or not, the evidence does not go so far as to establish actual connivance. But he certainly exposed his wife to temptation to which no wife ought to be exposed by her husband, and was guilty of neglect and misconduct conducing to the adultery."¹

As to what acts will amount to wilful neglect and misconduct conducing to adultery, these vary in each particular case, and as to any suspicion the petitioner might or ought to have had.

Besides what above appears, further instances might be given. An arrangement by which a young wife was to travel by the night mail from London to Ireland with a cavalry officer was characterised by Lord Penzance as a very imprudent one; but if there was no reason for suspicion, it is not imprudence of that sort that would lead the Court at once to come to the conclusion that he had been guilty of wilful neglect or misconduct.²

Lord Penzance observed on this clause that the statute threw on the Court the responsibility of saying whether or not the petitioner had been guilty of wilful neglect or

¹ *Barnes v. B.* (1867), L. R., 1 P. & M., 505.

² *St. Paul v. St. P.* (1869), L. R., 1 P. & M., 739; in this case the guilty parties, instead of proceeding to Cork, where the wife's father lived, as was intended by the husband, stopped and slept together at hotels in Stafford and Dublin.

misconduct; but as he preferred being assisted by the jury, he charged them as follows on the precise meaning of the words “Wilful neglect and misconduct”—

“The words are very large and general. . . . There is hardly a divorce case in which, scanning the circumstances after the wife has left her home and everything is known, you might not put your finger on some particular date or fact, and say, ‘What a pity the husband did not interfere here. If he had not been very careless, if he had taken better care of his wife, he would have done this or that.’ When an intimacy springs up between a married woman and a man who is not her husband, of a character not justified by the ordinary usages of society, the husband’s vigilance ought no doubt to be alarmed, and he ought to repress that intimacy. That is part of the duty of the husband; it is one of the obligations belonging to the marriage tie. But is that obligation of being alive to the first steps which might lead to dishonour, subject to the terrible penalty that if the husband neglects it he shall be tied to an adulterous woman for the rest of his life? That would be a proposition of a perilous latitude. He ought, no doubt, to fulfil that obligation, but is his neglect to do it the misconduct intended by the statute? I think it is not. I think that mere carelessness, the mere omission to do something here or there which ought to have been done, is not sufficient to constitute misconduct. Allowance must be made for men’s different dispositions. Some are very suspicious, others very confiding; some are of a very active turn of mind, others are less excitable and observant, and, although not indifferent when their feelings are touched, are less likely to take notice of what is passing about them. One man is so constituted that very small matters attract his attention and arouse his suspicion, whilst another is of a free, open, high-spirited disposition, cheerful temperament, and does not sit brooding over every trifle that occurs. Mere carelessness, therefore, is not sufficient to constitute misconduct; if it were, very few men, probably, would go safely through the ordeal. What, then, is the meaning of misconduct? The direction I give you is this:—Before you arrive at the conclusion that the petitioner has been guilty of such misconduct as the statute condemns, you ought to be thoroughly satisfied that the intimacy between these parties was of such a character as to be distinctly dangerous, that the husband knew so much of it as to perceive the danger, and that he either purposely or recklessly disregarded it, and forebore to interfere. I have only to add that in speaking of what the husband knew, I mean what he actually knew, not what a more suspicious nature or a more active vigilance might have prompted him to discover, unless, indeed, he should have purposely closed his eyes, which would be wilful misconduct, and something more. It is not necessary that a man should have intended any wrong; but if he saw danger, and recklessly allowed his wife to remain exposed to that danger, although

without intending wrong, he would be guilty of neglect. But, again, you must make allowance for the differences of mind and disposition, for one man may see danger in circumstances from which another would not draw such a conclusion.”¹

And in a later case Lord Penzance observed—

“This is very delicate ground, and the Court must be exceedingly careful in applying this provision to see its way pretty plainly to the conclusion that the husband’s conduct amounted to ‘wilful neglect or misconduct,’ and that such ‘wilful neglect or misconduct’ really conduced to the fall of the wife. . . . The Legislature does not mean that a husband shall be deprived of his remedy whenever it can be proved that some conduct on his part has conduced to any particular act of adultery after an adulterous intercourse has once been established; but it means that his remedy shall be withheld from him if he has so acted as to bring about that intercourse. That is a most important distinction. It may very well happen that a husband may be perfectly blameless as to his wife’s adultery in the first instance, but that after she has established an adulterous intercourse, she and her paramour acting together for the purpose of blinding the husband, and throwing as much dust in his eyes as possible, may carry on their intimacy in such a way that he may not perceive it, and it may be that, blinded by them, his conduct may appear more or less neglectful. It seems to me that the neglect intended by the Legislature is neglect conducing to the woman’s fall, and not neglect conducing to any particular act of adultery subsequent to her fall.”

In this case the wife of a solicitor at Maidenhead committed adultery with a captain in the Dragoon Guards. She was the daughter of a gentleman residing near Cork, and in 1865 and 1866 went to a hydropathic establishment near Cork at her father’s wish and for the sake, as she said, of her health. There in January 1866 she committed adultery with the co-respondent—a friend of her father. Her husband did not cross over till Easter 1866, and then and subsequently his conduct was weak and foolish, though falling short of connivance; but this weakness being subsequent to the adultery in January 1866, was not, according to the principles laid down above, held to be neglect conducing.²

¹ *Dering v. D.* (1868), L. R., 1 P. & M., 531.

² *St. Paul v. St. P.* (1869), L. R., 1 P. & M., 739; but, as was explained in this case, if, although owing to not knowing of the com-

In an action of criminal conversation, the fact that the plaintiff, an officer, having married an actress, returned to his military duties, and allowed her to continue to perform at the theatre as an unmarried woman, unprotected from the temptations to which, by her profession, she was exposed, was considered unofficial conduct, which might be urged in reduction of damages.¹

Non-consummation of the marriage could not, under the old ecclesiastical practice, be pleaded in bar of a suit for adultery;² but it might, it is suggested, amount to "wilful neglect;" see *post*, pp. 348, 349.

Although wilful neglect and misconduct conducing is usually a bar set up against a petitioning husband, yet such conduct may also be objected against a wife. Thus to a wife's petition for dissolution on the ground of cruelty and adultery, the husband pleaded that the petitioner—

"Habitually treated the respondent with insolence and neglect . . . frequently absented herself from home, and refused to inform the respondent where she had been, and that she constantly set his orders and wishes at defiance—without reasonable cause left the house of respondent and withdrew herself from cohabitation with him for the space of two years."

And the Court declared these pleas to be material, as showing

"That the misconduct of the petitioner provoked the violence of the respondent, or may raise the question whether she has conduced to his adultery."³

And as to private detectives, not only must the commencement of the intrigue the petitioner could not be guilty of "neglect conducing," yet if subsequently becoming aware of its guilty nature he allowed it to continue, he would be guilty of connivance; see *ante*, p. 268.

¹ *Calcraft v. Lord Harborough* (1831), 4 C. & P., 499; and for a similar dictum, see *ante*, p. 291.

² *Patrick v. P.* (1821), 3 Phillim., 496; *Hall v. H.* (1849), 7 N. of C., 56; and as to refusal of marital rights, see *ante*, Chap. IV, p. 171.

³ *Hughes v. H.* (1866), L. R., 1 P. & M., 219; and see *Borcham v. B.* (1866), L. R., 1 P. & M., 77.

tioner's own conduct not have conduced to the respondent's adultery, but if the agent employed by him or her brings about the respondent's adultery, such misconduct will be imputable to the petitioner, and bar him or her from obtaining relief on the ground of such adultery. In this case the petitioning husband had employed one Williams as a detective agent to watch the respondent (who was living separate from the petitioner), and to obtain evidence of her adultery. Williams, who stood treat, induced the respondent and co-respondent to go out from Old Swinford for a pleasure excursion to Worcester, Wolverhampton, and Birmingham for three days, sleeping a night at each place. He plied them with drink to the extent of intoxication (even to producing unconsciousness, as they said), and then put them to bed together, when, as they said, they were so drunk they did not even know they had gone to bed. On this evidence, Lord Penzance, the J. O., observed—

“If a husband employs a man to get evidence of adultery upon which to obtain a divorce, and the man so employed sets about to procure the defilement of the wife, and by the intervention of that man the wife is purposely induced to commit adultery, the petitioner has no right to a remedy in this Court for such adultery; and I further think that the husband would have no right to a remedy even if it were proved that he had not given any distinct orders for that purpose. . . . It is not necessary for me to determine whether Mr. Gower did give authority to Williams to bring about what was brought about. . . . I think it quite possible that he did not tell Williams to do what Williams appears to have done, but at the same time he never warned him not to do what a man of his class and character would be likely to do. The very first thing that would occur to such a man, if evidence were not forthcoming, would be to make an occasion which should furnish the evidence. In that point of view the petitioner is responsible for the act of his agent. But I decide the case on the broader ground that the petitioner cannot obtain the benefit of redress in this Court for an act of adultery brought about by his own agent. I dismiss the petition.”¹

¹ *Gower v. G.* (1872), L. R., 2 P. & M., 428; as to the evidence of detectives, see *post*, 5 (a), p. 308.

SEC. 5.—EVIDENCE AND DEFINITIONS

(a) *Generally*

The Common Law rules of evidence are applicable to all questions of fact tried.¹

The witnesses may be summoned by subpoena, and then are to be examined orally on oath in open court, except in cases where evidence upon affidavit is admitted. Further, where a witness is out of the jurisdiction, and in certain other circumstances, a witness may be examined on a commission issued by the Court. Wilfully giving false witness is perjury.²

Evidence of the Parties.—The Court may order the petitioner to attend to give evidence, and be examined and cross-examined; but he or she shall not be bound to answer any question tending to show he or she has been guilty of adultery.³

When the wife petitions for dissolution of marriage on the ground of her husband's adultery, coupled with either cruelty or desertion, the husband or wife are competent witnesses, and may be compelled by subpoena, issued by either party, to give evidence as to such cruelty and desertion.⁴

Lastly, in 1869 it was provided that

“The parties to any proceeding instituted in consequence of adultery,

¹ 20 & 21 Vict., c. 85, s. 48; 38 & 39 Vict., c. 77, ss. 20, 21.

² 20 & 21 Vict., c. 85, ss. 46–50, rules 51–55, 109, 129–146, 180, 188, 198; and see also as to evidence on affidavit, *Macartney v. M.* (1866), L. R., 1 P. & M., 259.

³ 20 & 21 Vict., c. 85, s. 43; see *Ross v. R.* (1869), L. R., 1 P. & M., 629; but if such petitioner, having been called as a witness, has given evidence in chief in disproof of his or her alleged adultery, he or she may be cross-examined thereon, see above.

⁴ 22 & 23 Vict., c. 61, s. 6.

and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to a suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall already have given evidence in disproof of his or her alleged adultery.”¹

But the clause that a witness is not liable to be asked or bound to answer any question showing he or she has been guilty of adultery, is only for the protection of the witness, not for the object of excluding evidence; therefore a prostitute may be called to give evidence that she has committed adultery with the husband. It is the duty of the judge to see that a witness has the protection given them by the statute, and if they claim it, to refuse to allow any questions to be put; but if the witness is willing to answer, then evidence is admissible.²

Also the usual rule of the privilege of professional communications applies, and therefore a solicitor to either of the parties cannot be asked, not even by the Queen's Proctor, if his client admitted to him that he or she had been guilty of a matrimonial offence.³

The only Ecclesiastical rule forbade divorce to be granted on, and “that credit be not given to the sole confession of the parties themselves, howsoever taken on oath, whether within or without the court;”⁴ but the Matrimonial Causes Act, 1857, enacted that the Common Law rules of evidence shall be applicable, and observed in the trial of all questions of fact.⁵ As to evidence by

¹ 32 & 33 Vict., c. 68, s. 3; and see *Babbage v. B.* (1870), L. R., 2 P. & M., 222; *Brown v. B.* (1874), L. R., 3 P. & M., 198; *Jackman v. J.* (1889), 14 P. D., 62.

² *Hebblethwaite v. H.* (1869), L. R., 2 P. & M., 29.

³ *Branford v. B.* (1878), 4 P. D., 72; and see *Simmons v. S.* (1847), 5 N. of C., 324, as to cross-examining professional adviser; and see *ante*, p. 283.

⁴ Canon 105; and see *Mortimer v. M.* (1820), 2 Hag. Con., 310.

⁵ 20 & 21 Vict., c. 85, s. 48; 38 & 39 Vict., c. 77, ss. 20, 21.

way of estoppel, adultery, or cruelty against the petitioner or respondent, see *ante*, Estoppel, pp. 285, 288.

Admissions and confessions by a respondent or co-respondent are therefore evidence against each of them respectively; and the Court, if satisfied that the confessions are genuine, and that there is no reasonable ground to suspect collusion, may give a decree on a confession alone;¹ but admissions and confessions by the respondent are not evidence against the co-respondent, and *vice versâ*.² However, confessions are jealously scrutinised, especially if uncorroborated; and in a case where the alleged confession was contained in a journal written by the wife, of a highly erotic nature, but not directly admitting actual sexual intercourse, and it was proved that many of the statements in it were exaggerated or imaginary, the Court refused a decree.² As to the evidence of letters, see *post*, 321.

The evidence of a *particeps criminis* is admissible for or against either respondent or co-respondent;³ and where

¹ *Williams v. W.* (1865), L. R., 1 P. & M., 29.

² *Robinson v. R.* (1859), 1 Sw. & Tr., 362; *Crawford v. C.* (1886), 11 P. D., 150; but, as actually subsequently happened in both these cases, the respondent and co-respondent can be called as witnesses, subject to the restrictions previously explained, and their sworn evidence is admissible; for a further account of *Crawford v. C.*, see *ante*, p. 257. But the conduct of the wife on being charged with adultery, on the confession of the adulterer, *i.e.*, if she adopts the confession, is evidence against her; *Harris v. H.* (1829), 2 Hag. Ec., 376, p. 407; *Croft v. C.* (1830), 3 Hag. Ec., 310, p. 318. However, a declaration by the co-respondent's mother at the baptism of the child, issue of adulterous intercourse, is not evidence; *Faussett v. F.* (1849), 7 N. of C., 72, pp. 93-95.

³ *Soilleux v. S.* (1802), 1 Hag. Con., 373, p. 376; *Best v. B.* (1823), 1 Add., 411, p. 438; *Simmons v. S.* (1847), 5 N. of C., 324, and 6 N. of C., 578; *Crawford v. C.* (1886), 11 P. D., 150. When an alleged adulterer gives evidence in favour of the wife, his evidence must be watched with extraordinary vigilance; *Fraser v. F.* (1846), 5 N. of C., 11, pp. 45-47.

the husband is the respondent it frequently happens that the prostitute with whom he is alleged to have committed adultery is called as witness.¹ Prostitutes' evidence is admissible as the rule in *re lupanari testes lupanares admittentur*, but their evidence is jealously scanned if uncorroborated.²

As to weighing the credibility of witnesses to evidence of adultery, Lord Penzance, J. C., laid down as his constant rule—

“That there is a wide difference between the position of a husband living contentedly with his wife, and being told by some one of her adultery, and that of a husband living apart from her, and subject to a money payment for her support. The discovery in the one case is a source of pain and discomfort, while in the other it is a source of relief, as it may lead to a divorce. In the first case, the husband receives the evidence brought to his knowledge with reluctance and distrust, and it is only when the matter is forced upon him by evidence from which he cannot withhold his assent that he takes it up; but in a case like the present (the husband and wife were separated, he paying her an allowance), the husband is, as it were, on the look-out for evidence, and those who may have seen or heard anything against the wife, instead of being reluctant to let him know it, are prone to come forward, because they are sure that their tale will be well received, and the husband will be glad to hear that there is a means of escaping from the bond he has contracted. The Court is therefore bound to watch the evidence narrowly.”³

And the Court looks carefully into the evidence of detectives, especially if they are highly paid to collect evidence.⁴

The children of the parties are admissible witnesses, and are not supposed to be biassed either way;⁵ but the

¹ *Hebblethwaite v. H.* (1869), L. R., 2 P. & M., 29.

² See *Wilson v. W.* (1872), L. R., 2 P. & M., 435, p. 440; *Ginger v. G.* (1865), L. R., 1 P. & M., 37; *Ciocci v. C.* (1853), 1 Spinks, Ecc. & Add., 121, p. 133; *Astley v. A.* (1828), 1 Hag. Ec., 714, p. 717.

³ *Gower v. G.* (1872), L. R., 2 P. & M., 428.

⁴ *Sopwith v. S.* (1859), 4 Sw. & Tr., 243; and see *Wilson v. W.* (1872), L. R., 2 P. & M., 435, p. 440; and see *ante*, pp. 303, 304.

⁵ *Lockwood v. L.* (1839), 2 Curt., 281; *Saunders v. S.* (1847), 5 N.

evidence of near relations is presumed to be biassed, according as they are related to husband or wife respectively.¹ The evidence of servants also is usually biassed in favour of the side that produced; and in case of cruelty, the servants usually come in at the end of the affray, which they have but imperfectly seen.² If servants continue to live in the house, seeing the adultery, they become corrupted witnesses.³

Evidence can also be obtained by one party obtaining, as against the other, discovery of document or administering interrogatories; but a party cannot be interrogated to show he or she is guilty of adultery.⁴

The Ecclesiastical Court had power to make decree of "confrontation" of the parties, with witnesses to aid identification;⁵ but this cannot now be done by the Probate and Divorce Division in petitions for dissolution; the 43rd section of the Matrimonial Causes Act, 1857, only empowering the Court to order the attendance of the petitioner, not of the respondent.⁶

As to respondent who does not defend coming into Court by arrangement with petitioner, see *ante*, p. 283.

(b) Adultery

Adultery by a wife or adultery by a husband during the marriage, coupled with cruelty or desertion, is ground

of C., 408, p. 413; *Chesnutt v. C.* (1854), 1 Spinks, Ecc. & Add., 196, p. 203, 204.

¹ *Saunders v. S.*, *ubi sup.*

² *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, p. 74; *Dysart v. D.* (1847), 5 N. of C., 194, p. 196; and see *post*, p. 325.

³ *Crewe v. C.* (1800), 3 Hag. Ec., 123, p. 127.

⁴ *Redfern v. R.* (1891), P., 139, C. A.; and see Dixon on Divorce, 2nd. ed., p. 276; *aliter* in nullity, see *ante*, pp. 215, 236.

⁵ Clerk's Instruction in Ecclesiastical Cases, p. 392; and see *Searle v. Price* (1816), 2 Hag. Con., 187.

⁶ *Hooke v. H.* (1858), 4 Sw. & Tr., 236; and see *Lloyd v. L.* (1866), L. R., 1 P. & M., 222.

for dissolution;¹ and adultery alone by either party is ground for judicial separation;² adultery with bigamy by a husband is ground for dissolution, see *post*, p. 349. Adultery by a petitioner also constitutes a discretionary bar.³ But in all these cases the same measure of evidence is necessary to prove adultery; but evidence as to identity is not so strict as against the Queen's Proctor intervening.⁴ As to proof of adultery by estoppel, see *ante*, pp. 285, 288.

That by the law of England, adultery, though a grievous sin, is not a crime, was decided by the House of Lords, and a petition for a divorce is a civil and not a criminal proceeding.⁵ But adultery and also fornication and solicitation of chastity are ecclesiastical offences punishable in the Ecclesiastical Court, reserved for its exclusive cognisance by the statute *Circumspecte Agatis*;⁶

¹ 20 & 21 Vict., c. 85, ss. 27, 29, 30, 31.

² See Chap. VIII, s. 1 (*b*).

³ See *ante*, s. 4 (*b*), p. 288; as to adultery by the petitioner being a bar to judicial separation, see Chap. VIII, s. 2 (*a*).

⁴ *Hulse v. H.* (1872), L. R., 2 P. & M., 357; see *ante*, p. 265.

⁵ *Mordaunt v. Moucreiffe* (1874), L. R., 2 H. L., Sc. & D., 374; but by the statute of Westminster, II, c. 34, intercourse with a married woman was rape, see Hale, P. C., chap. lix., p. 636; Co. Ins., vol. ii., p. 432, vol. iii., p. 206; and see Emlyn's preface to State Trials, vol. i., p. 33. An attempt was made by the Star Chamber to punish adultery as an "enormous crime" under 1 Eliz., c. 1, s. 18; but Sir Edward Coke, C. J., delivered by *habeas corpus* those imprisoned therefor by the High Commissioners; see *Chancey's case* (1612), 2 Brownl., 18, 12 Coke Rep. 82; *Dr. Conway's case* (1611), 2 Brownl., 37. It was also attempted to legislate against it, in the Reformation Legum, see Report of Divorce Commission, 1853 [1604], and *ante*, Chap. I, p. 8. In Parliament a Bill was introduced in 1604, see Parl. Hist. of England, vol. v., p. 88; and in 1800, see Cobbett's Parliamentary History, vol. xxxv., pp. 225-325; and under the Commonwealth an Act was passed, see Scobell's Acts, pt. ii., p. 121, cited 7 C. & P., 200, n. In British India a man committing adultery with a married woman is liable to five years' imprisonment, or a fine, or both; see Penal Code, sec. 497; Code of Criminal Procedure, sec. 478.

⁶ 13 Ed. I; see Gibson, Codex, 1085; Burns' Ecc. Law, tit. Lewdness; and see Report of the Commission on Ecclesiastical Courts, 1883; and the

but no such suit in the Ecclesiastical Court for fornication or incontinence shall be commenced after eight months from the time of the offence, or carried for fornication after the parties offending have been married;¹ and it is the duty of churchwardens and ministers to present in cases of adultery, whoredom, or uncleanness of life.² And as to clergymen, the Clergy Discipline Act, 1892, provides that a bastardy order, a finding of adultery, a judicial or magisterial separation order against a clergyman avoids his preferment, and immorality is a ground for prosecution. But this does not apply to bishops.³

As to the other effects of adultery at Common Law, see *post*, Chap. XIII.

Continued adultery ripens into desertion, see *post* (*d*), pp. 342, 334. And it has also been argued that adultery may constitute cruelty, see *post* (*c*), p. 332.

An exception from adultery has been set up in favour of Jewish husbands, who, it is said, are entitled by the Jewish law to keep concubines; but Lord Stowell doubted how far this could now be recognised.⁴

Adultery may be defined as voluntary sexual intercourse between a married person and a human being of the opposite sex⁵ during the subsistence of the marriage.

Historical Appendices by Canon Stubbs [c. 3760]; and see per Bowen, L. J., in *Redfern v. R.* (1891), P., 139, pp. 145 and 147; *Gallisand v. Rigaud* (1702), Lord Raymond, 809; and see *post*, pp. 349, 350.

¹ 27 Geo. III, c. 44, s. 2, still in force.

² Canons 109, 113. But the Report of the Ecclesiastical Courts Commission, 1831 (70), states, p. 64, "In the Arches and Consistory of London no such suit has been brought for a long series of years; in some of the County Courts they have been very rare."

³ 55 & 56 Vict., c. 32; and see *post*, Chap. XIII, s. 8.

⁴ *D'Aguilar v. D'A.* (1797), 1 Hag. Ec., 773, p. 785.

⁵ As to sodomy and bestiality by a husband, see *post*, p. 350. Praxis inter fœminas quæ Tribadisma, mollities, Saphisma, vel Gallicum aut Lesbianum vitium vocatur non est apud sententiam auctoris adulterium. Aliquando autem in causa matrimoniali de hoc vitio in uxore mentio est

Such sexual intercourse must be during the marriage. So antenuptial unchastity cannot be given in evidence against either husband or wife.¹

Not even if the wife's antenuptial unchastity has resulted in pregnancy, which is existing, but concealed from the husband at the date of the marriage, does that constitute adultery. In this case an officer quartered at Cowes received a letter from the respondent, a lady whom he had met at the house of her uncle, a gentleman of position in the Midlands, and in the letter she asked him to come to see her at Southampton. He went, and she told him that she was in great trouble, and that her uncle had made her marry a man who turned out to have a wife living, and her relations had given her up. The officer made her an offer of marriage and then repented; but under a threat of action of breach of promise he married her. He then found out, and she admitted, she was some months gone in pregnancy. On this he ceased cohabitation. This was not adultery.²

facta, non vero quia sit causa divortii sed quia sit causa quæ impediatur divortium apud regulam supra scriptam; 4 (e) (f), pp. 295, 297. *Vide* Dalloz, *Jurisprudence generale Repertoire*, tit. Adultère, 12; Caspar's *Forensic Jurisprudence*, by Balfour, vol. iii., p. 335; Rom. i. 26; Saucier, lib. x., disp. 4, Nos. 3-5. *Praxis inter uxorem et bestiam est vitium sed non crimen*; *vide* 24 & 25 Vict., c. 100, ss. 61, 62; Lev. xviii. 23 and xx. 16, et monstra ab ea nata nequeunt esse heredes; *vide* Bl. Com., tit. Monstrum, et Co. Lit., 7b and 29b, dubitatur autem an sit adulterium.

¹ See *Perrin v. P.* (1822), 1 Add., 1; and see *Sullivan v. S.* (1824), 2 Add., 299, p. 306; *Graves v. G.* (1842), 3 Curt., 235. If a husband has illegitimate children at the date of the marriage, the wife should be informed of it; *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, pp. 80, 91; *King v. K.* (1847), 5 N. of C., 244, p. 256.

² *Kennedy v. K.* (1890), 62 L. T., 705; and see *ante*, p. 27; but such pregnancy at the date of the marriage is a reasonable excuse for the husband deserting her; see *post* (d), p. 347. A clause constituting concealed pregnancy on the date of the marriage a ground for nullity, where the Court was satisfied the petitioner was not the child's father, was proposed by Lord Redesdale to be added to the Matrimonial Causes

But if the adultery is alleged to have taken place with the same persons with whom there was antenuptial incontinency, it may be pleaded; for antecedent circumstances explain subsequent acts, and thereby acts which, taken *per se*, are of a doubtful or innocent character assume a different complexion.¹

And as the nuptial tie continues till decree absolute of nullity or dissolution, a petitioner having, after a decree *nisi*, had sexual intercourse with any person other than the respondent, constitutes adultery during the marriage, for which the Queen's Proctor may intervene, and the Court may rescind the decree *nisi*.²

The intercourse must be *voluntary*; so if a wife is ravished or forced by the co-respondent, this is not adultery.³ So where a jury found adultery against the respondent and co-respondent, and assessed the damages

Act, 1860, but struck out by the Lord Chancellor; see Hansard, 3rd series, vol. clviii., p. 217.

¹ *Weatherley v. W.* (1854), 1 Spinks, Ecc. & Add., 193.

² *Hulse v. H.* (1871), L. R., 2 P. & M., 259, 357; *Noble v. N.* (1869), L. R., 1 P. & M., 691; *Wickham v. W.* (1880), 6 P. D., 11; and see *ante*, s. 4 (b), p. 288. Sexual intercourse after a decree of divorce *a mensa et thoro* from the Ecclesiastical Court is adultery, and disentitled the petitioner to a decree for dissolution; *Lautour v. Queen's Proctor* (1864), 10 H. L. C., 685; *Ritchie v. R.* (1861), 4 Macq. H. L., 162.

³ The crime of rape is sexual intercourse with a woman without her consent; and sexual intercourse with a lunatic or drunken woman is rape, for they cannot consent. See Roscoe's Criminal Evidence, and Archbold's Criminal Pleading; and 24 & 25 Vict., c. 100, ss. 48, 63. Also if a man has intercourse with a married woman by personating her husband, this is declared to be rape by the Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, s. 4; and see *post*, Chap. XV, s. 6. See also *Gower v. G.* (1872), L. R., 2 P. & M., 428, where the petitioner's detective plied the wife and the co-respondent with drink and put them to bed together, and on this account the petitioner was refused a decree; see this case given at greater length, *ante*, pp. 303, 304; and see Dalloz, tit. Adultère, sec. 2, No. 20. A woman cannot be convicted of rape, Taylor's Medical Jurisprudence, 2nd ed., vol. ii., p. 471; and if a husband tells a story that he was forced, the Court will disbelieve it; *Story v. S.* (1887), 12 P. D., 196.

at £50, notwithstanding this Butt, J., refused to rely on the verdict of the jury, but having had the respondent examined before him, and finding that she was weak mentally and physically, and she swearing that she had been forced, and that she was not a consenting party, refused a decree *nisi*, and dismissed the suit against the wife, and gave judgment against the co-respondent for damages and costs.¹

As to adultery committed during insanity, it has been very recently laid down that although the respondent wife may not be of absolutely sane mind, and not free from delusions, as, *e.g.*, where she left her home under the delusion that her husband was endeavouring to poison her; still, if she is capable of appreciating the nature and character of the act of adultery, and consequent divorce which it might entail, then she will be held guilty of adultery.²

Lastly, it must be actual sexual intercourse consummated, and no proof of indecent liberties and improper familiarities will suffice to constitute adultery, if it can also be proved that no sexual intercourse actually occurred. As, for instance, it was proved that the wife went to a hotel with a young man, took a room, the blinds were pulled down, the door was locked, they remained there for a considerable time, and when they left the room was in considerable confusion. These were circumstances that raised a very strong suspicion. But, on the other hand, the wife asserted that her marriage had never been consummated, and that she was *virgo intacta*, which was proved by the evidence of two medical men, who inspected her and swore that they were satis-

¹ *Long v. L.* (1890), 15 P. D., 218.

² *Yarrow v. Y.* (1892), P. 92; and see *Hanbury v. H.* (1892), P. 222.

fied that she was a virgin, and that no sexual intercourse had ever taken place. On this the Court held that there was no adultery.¹

The Court or jury must be convinced that the wife has transgressed, not only the bounds of delicacy, but of duty; that there has been a surrender, not only of the mind, but of the person.²

Presumption. — As intercourse is usually secret, the Court or jury can, according to the old established practice, presume adultery on proof being given of suspicious acts and familiarities.³

Direct evidence or ocular proof is not required, for it would render relief almost impracticable; but there must be such proximate circumstances proved as by former decisions, or in their own nature and tendency, satisfy the legal conviction of the Court that the criminal act has been committed.⁴ And the Court does not take insulated

¹ *Hunt v. H.* (1856), Dea. & Sw., 121. In a case, curiously the converse of this, a wife first petitioned for nullity on the ground of her husband's impotence, which suit failed, and then petitioned for dissolution on the ground of his adultery and cruelty, and was granted a decree; *Ditchfield v. D.* (1869), L. R., 1 P. & M., 729. Crimen est sodomia feminae cum homine; *R. v. Wiseman* (1718), Fortescue, 91; dubitatur autem an est adulterium. Mere kisses or lewd practices are not adultery; Sanchez, bk. x., disp. 4, No. 11 and 12; *Hamerton v. H.* (1828), 2 Hag. Ec., 8, p. 14; nor is mere solicitation of chastity; *Elwes v. E.* (1796), 1 Hag. Con., 269, p. 278; *Chettle v. C.* (1821), 3 Phillim., 507; and see 24 & 25 Vict., c. 100, s. 63, as evidence of rape.

² See *Robinson v. R.* (1859), 1 Sw. & Tr., 362; the above expressions were continually used by Lord Stowell, see *Williams v. W.* (1798), 1 Hag. Con., 299, p. 303; and see *Hamerton v. H.*, *ubi sup.*; but such expressions from the respondent wife are distrusted; *Grant v. G.* (1839), 2 Curt., 16, p. 61.

³ See *Elwes v. E.* (1796), 1 Hag. Con., 269, p. 279; where the principle of such presumption is explained. See Ayliffe's Parergon.

⁴ *Williams v. W.* (1798), 1 Hag. Con., 299; *Loveden v. L.* (1810), 2 Hag. Con., 1; *Hamerton v. H.* (1828), 2 Hag. Ec., 8; *Davidson v. D.* (1856), Dea. & Sw., 132.

and detached charges, but is entitled to examine the whole together.¹

The fact that a witness does not draw a conclusion of adultery from what he or she saw, does not estop the Court from drawing that conclusion.²

It is not necessary to prove adultery at any particular time or place; but it is generally necessary to prove that the parties were in some place together where adultery might probably have been committed. Were it indeed otherwise, it might happen that guilty intention would be mistaken for actual guilt.³

But mere proof of opportunity, short of cohabitation or pernoctation, without evidence of guilty intention, will not be sufficient to allow a deduction of adultery to be drawn.

Further, if on the balance of evidence there exists any reasonable doubt, it must be given in favour of innocence and against guilt.⁴ Also, where a wife has conducted, during a married life of twenty years, with propriety, the Court will not conclude that she has been guilty of adultery charged to have been committed without slightest regard for decency or fear of detection, unless established by cogent evidence.⁵

If the guilty parties have generally cohabited, the mere fact that, if in the same house they occupied separate beds, or supposing they met by concert and remain for weeks or more in some far off place, the mere fact that they occupy separate houses, will not prevent a deduction of adultery being drawn.⁶

¹ *Durant v. D.* (1825), 1 Hag. Ec., 733, p. 748; *Grant v. G.* (1839), 2 Curt., 16, p. 37.

² *Elwes v. E.*, *ubi sup.*, p. 278. ³ *Cotton v. C.* (1849), 7 N. of C., 9.

⁴ *Ciocci v. C.* (1835), 1 Spinks, Ecc. & Ad., 121, p. 134.

⁵ *Alexander v. A.* (1860), 2 Sw. & Tr., 95.

⁶ *Rutton v. R.* (1796), Arches; *Cadogan, Lord, v. Cadogan, Lady* (1796), 2 Hag. Con., 4, n.; *Chambers v. C.* (1810), 1 Hag. Con., 439.

Clandestinity and secrecy gives a suspicious appearance to that which might otherwise be harmless or ambiguous.¹

So also, if there is difference in the conduct of the wife towards the alleged adulterer, according as the husband is absent or present, that excites the suspicion of the Court.²

Proof that in the petitioning husband's absence a child meanwhile has been born of which he could not be the father, and of the identity of the respondent, is conclusive proof of adultery; further facts need not be proved.³

And *e converso* as against a respondent husband where pregnancy of his mistress, and his acknowledgment of the resulting child, is proved, it is not necessary to bring further evidence of adultery.⁴

As to arts of familiarity, Lord Stowell observed—

“I decline entering into a particular discussion of the acts of freedom, chiefly because the effect produced upon my judgment is not produced by them as detached facts, but as being in connection. When detached, some are improprieties or indelicacies, others not so much so, others not at all. Put the question on each distinct fact, and it may not amount to much, but that is not the way of considering the case. I take the whole together; I consider them as a train of assiduities and worth our attention, as conduct distinguishing the gallantries of one man to one woman, as marking a system of behaviour from her to this one woman which differs from his conduct to others.”⁵

But, *e converso*, Dr. Lushington said that no combination of minor circumstances, though calculated to give a colour to facts, will supply the place of proof of facts.⁶

Visit by either husband or wife to a brothel is conclusive proof of adultery.⁷

¹ See *Loveden v. L.* (1810), 2 Hag. Con., 1; *Elwes v. E.* (1796), 1 Hag. Con., 269, p. 272.

² *Grant v. G.* (1836), 2 Curt., 16, p. 39.

³ *Richardson v. R.* (1827), 1 Hag. Ec., 6.

⁴ *Durant v. D.* (1825), 1 Hag. Ec., 733, p. 746.

⁵ *Moorson v. M.* (1792), 3 Hag., 87, p. 112.

⁶ *Grover v. G.* (1836), 5 N. of C., 463, n.

⁷ *Elliot v. E.* (1776), Arches, cited 1 Hag. Con., 302; and see *Kenrick*

But the visit of a wife to a single man's lodging or chambers does not of itself, without other facts, such as the behaviour of the parties and the state of the room, prove adultery.¹

So proof of a young man being privately introduced into the house and other clandestine and nocturnal meetings is evidence of adultery;² and so also is it if a man goes into the wife's bedroom with her.³

A married woman being seen to come out of the bedroom of a young unmarried man is a very high *indecorum*, and coupled with other circumstances may amount to proof of adultery.⁴ Evidence that during the suit the *particeps criminis* has frequently visited the wife and stayed till late at night, has held, with other facts, evidence of adultery.⁵

As to infection with venereal disease being proof of adultery, see *post* (c), pp. 331, 332.

Stopping the night at the same lodging-house with a married woman living alone, is a suspicious circumstance against both of them, requiring explanation.⁶ And if the alleged adulterer stopped the whole night at the wife's lodging in the same room with the wife, where there was only one bed, it is conclusive evidence of adultery.⁷

v. K. (1832), 4 Hag. Ec., 114, p. 138; *Astley v. A.* (1829), 1 Hag. Ec., 714. As the old English proverb there cited runs: "Persons do not go to a brothel to say their paternosters."

¹ *Williams v. W.* (1798), 1 Hag. Con., 299; and in *Fraser v. F.* (1846), 5 N. of C., 11, pp. 23 and seq.

² *Loveden v. L.* (1810), 2 Hag. Con., 1.

³ *Caton v. C.* (1849), 7 N. of C., 9, pp. 25, 30.

⁴ *Burgess v. B.* (1817), 2 Hag. Con., 223, p. 232; *Fraser v. F.*, *ubi sup.*, pp. 32, 33; *Faussett v. F.* (1849), 7 N. of C., 72, p. 85, and see *ib.*, pp. 79, 80, as to "locked doors."

⁵ *Hamerton v. H.* (1829), 3 Hag. Ec., 1.

⁶ *Harris v. H.* (1829), 2 Hag. Ec., 376, pp. 387-395; *Grant v. G.* (1839), 2 Curt., 16, p. 52 and seq.

⁷ *Drew v. D.* (1842), 1 N. of C., 315.

When once a criminal connection is shown, its continuance is presumed when the parties live under the same roof.¹ But where the co-respondent had paid numerous visits to the wife in the petitioner's absence, the co-respondent setting up and proving that he was paying attentions, not to the respondent, but to her unmarried sister, it was accepted as explanation of the suspicious visits.²

A married woman stopping the night out, and refusing to explain where she slept, is a suspicious circumstance.³

Proved solicitation of chastity will afford ground for inferring that where no resistance was met, adultery was committed.⁴

"When dislike of a husband and attachmennt to another man are co-eval, the dislike shown of the husband may deserve consideration as one of the effects, and consequently proofs of an improper attachment."

But this would not be so if there were domestic quarrels previous to the wife's acquaintance with the alleged adulterer.⁵

If a wife is last seen by a witness reclining on a bank with the alleged adulterer's arm round her waist, they whispering together and ample opportunity follows, the deduction of adultery will be drawn.⁶

The alleged adulterer putting his hand on the respondent's thigh is an act of gross familiarity,⁷ and also putting his arm round her waist is suspicious.⁸

A married woman nursing her child in the presence of

¹ *Turton v. T.* (1830), 3 Hag. Ec., 338, p. 390.

² *West v. W.* (1870), L. R., 2 P. & M., 196.

³ *Owen v. O.* (1831), 4 Hag. Ec., 261; Ayliffe's Parergon, 51, 52.

⁴ *Forster v. F.* (1790), 1 Hag. Con., 144, p. 152; *Soilleux v. S.* (1802), *ib.*, 373; and see *Chettle v. C.* (1821), 3 Phillim., 507; see as to solicitation by the wife, *Taylor v. T.* (1848), 6 N. of C., 558.

⁵ *Fraser v. F.* (1846), 5 N. of C., 11, p. 44.

⁶ *Harris v. H.* (1829), 2 Hag. Ec., 376, p. 396.

⁷ *Grant v. G.* (1839), 2 Curt., 16, p. 41.

⁸ *Grant v. G.*, *ubi sup.*; *Faussett v. F.* (1849), 7 N. of C., 72, p. 83.

a man is an act of great indelicacy, raising a presumption against her.¹

Drunkenness proved against a wife makes her adultery more probable.²

Presents of money made by a husband to a prostitute are evidences of adultery;³ also presents of money made by the alleged adulterer to a wife, but not articles of compliment, as needlework, slippers,⁴ or presents of fruit and game, which are common acts of civility.⁵

A naval officer giving a married lady a passage on board a man-of-war is no evidence of adultery against him or her.⁶

Also as to life on board ship, too much stress must not be laid on facility of access, for it is not purposely made, but incidental to the state of a ship; and it is quite evident that on board a vessel difficulty of access, even when desired, can seldom be effected.⁷

If a respondent husband admits habitually consorting with prostitutes, but explains that he did so from pure and benevolent motives, and in order to reform them, the *onus probandi* of making out this explanation is on the husband. In this case the husband set up that he was connected with a Female Aid Society; as to which Dr. Lushington—

“I must observe, however, by the way, that even the establishment of such connection does not of necessity prove innocence. No one could contend that a support of such societies, however laudable in itself,

¹ *Caton v. C.* (1849), 7 N. of C., 9, pp. 25, 30.

² *Jones v. J.* (1847), 5 N. of C., 134; and see *Taylor v. T.* (1848), 6 N. of C., 558.

³ *Cocksedge v. C.* (1844), 1 Rob. Ec., 90, p. 98.

⁴ *Fraser v. F.* (1846), 5 N. of C., 11, pp. 33, 34.

⁵ *Moorsom v. M.* (1792), 3 Hag. Ec., 87, pp. 93, 94.

⁶ *Harris v. H.* (1829), 2 Hag. Ec., 376.

⁷ *Harris v. H.*, *ubi sup.*; and see *Grant v. G.* (1839), 2 Curt., 16.

constituted a panoply of purity . . . still a *bonâ fide* connection with such a society, a *bonâ fide* and prudent furtherance of its objects, would go a long way to account for conduct otherwise suspicious, if not explained.”¹

Letters are very frequently used in evidence.² A letter written by the wife to the adulterer containing reference to her times has been held conclusive proof of adultery, unless the writer were a lunatic, or the letters were written to bring a false charge against the alleged adulterer.³

Letters written to and received by the wife are not such strong evidence against her.⁴

It often happens that the petitioner or the petitioner’s detectives endeavour to obtain from Post-Office employees letters to or by the respondent; this is an offence under the Act by the employee and the public.⁵ If the letter has passed out of Post-Office custody, opening it for curiosity is merely a trespass and not a felony.⁶

Identity and Diversity.—As a matter of evidence the proof of identity is often difficult. For instance, assuming the respondent to be the husband, it is, say, proved by a witness, such as a lodging-house keeper, that a man under the name of Mr. Brown and a woman occupied rooms in her house and cohabited as man and wife; but such witness, if the respondent does not appear, cannot prove that Mr. Brown is identical with Mr. Jones, the petitioner’s

¹ *Ciocchi v. C.* (1853), 1 Spinks, Ecc. & Ad., 121, pp. 148 and seq.

² *Bramwell v. B.* (1831), 3 Hag. Ec., 618; *Owen v. O.* (1831), 4 Hag. Ec., 261; *Grant v. G.* (1839), 2 Curt., 16, pp. 57 and seq.; *Tucker v. T.* (1847), 5 N. of C., 458; *Deane v. D.* (1847), 5 N. of C., 626; *Caton v. C.* (1849), 7 N. of C., p. 15; and see the Common Law cases collected, *ante*, p. 258, as to wife’s previous fond letters to husband being evidence in aggravation of damages.

³ *Loveden v. L.* (1810), 2 Hag. Con., 1.

⁴ *Hamerton v. H.* (1828), 2 Hag. Ec., 8.

⁵ See 7 Will. IV, and 1 Vict., c. 36, explained in books of criminal law; and see *R. v. James* (1800), 24 Q. B. D., 439.

⁶ *R. v. Godfrey* (1838), 8 C. & P., 563.

husband ; although she can say in court that the woman who cohabited with Mr. Jones was not the petitioner.

In these cases the best mode of proof is that a witness, such as the petitioner, or, still better, some one else who is acquainted with the respondent, should go with the lodging-house keeper, and in her presence identify Mr. Brown as the same person as Mr. Jones ; so that the witness to the adultery and the witness to identity may concur.¹

Evidence of diversity to the effect that the woman with whom Mr. Brown, *alias* Jones, cohabited is not the petitioner.

As against the Queen's Proctor intervening to prove the petitioner's adultery, he is not held to such strict proof of identity as in the trial of such an issue between husband and wife which may be undefended or only defended collusively. But on the Queen's Proctor's intervention—

"There is no reason to doubt but that the petitioner will contest the matter and refute the evidence if he can." . . . In this case it was "not disputed that the evidence is sufficient to establish the charge of adultery if there be proof of identity. . . . Evidence is now given that a man passing under the name of the petitioner lived in the house mentioned in the Queen's Proctor's plea and committed adultery there at the time and with the person specified in the plea ; and that the same man afterwards took lodgings at Mertou Place, where he gave a card on which were the names 'Samuel George Hulse,' corresponding with the name of the petitioner. The strong inference is that this man was the petitioner, although the proof is not as clear as would be required if this were a question of identity arising in a suit between husband and wife. I am of opinion that a *prima facie* case of identity has been established, and full notice of the charge having been given to the

¹ See *Williams v. W.* (1798), 1 Hag. Con., 299 ; *Dillon v. D.* (1842), 3 Curt., 86 ; *Fraser v. F.* (1846), 5 N. of C., 11, p. 28 ; *Deane v. D.* (1847), 5 N. of C., 626 ; and *Harris v. H.* (1870), L. R., 2 P. & M., 77 ; and see Dixon on Divorce, 2nd ed., p. 340. The Court generally rejects evidence identification by means of a photograph, Dixon, p. 341 ; but see identification by photograph admitted in a criminal case, *R. v. Tolson* (1864), 4 F. & F., 103 ; also in a Scotch Divorce, *L. v. L.* (March 20, 1890), 17 R., 754.

petitioner, he is bound to produce evidence to rebut it. As no evidence is forthcoming on his behalf, the decree *nisi* will be reversed, and the petition dismissed.”¹

(c) *Cruelty*²

Adultery “coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*,”³ committed by a husband, is ground for a dissolution in the wife suing; and cruelty alone by either party is a ground for judicial separation.⁴ As to cruelty as a discretionary bar, see *ante* (c), p. 292. Whether the petition be for judicial separation or dissolution of marriage, the same facts are required to constitute legal cruelty. A suit for restitution of conjugal right by the petitioner is inconsistent with a charge of cruelty; see *post*, p. 278.

As to cruelty reviving previous condoned matrimonial offences, see *ante*. Condonation and Reviver, see s. 3 (d), p. 281; and when cruelty is set up as reviving previous condoned matrimonial offences, “it is not necessary that subsequent acts of cruelty should be of exactly the same amount as those which have been committed on earlier occasions.”⁵ A charge of cruelty makes adultery more probable.⁶

If the case is not before the Court itself, the Court directs the jury what is legal cruelty, and then the jury are to find, not only whether the acts complained of were done, but whether they constituted legal cruelty.⁷

¹ *Hulse v. H.* (1871), L. R., 2 P. & M., 357.

² If a wife wished not to be divorced, but to be protected from a cruel husband, she could either obtain securities of the peace in the ordinary way from a magistrate, or apply for a writ of *supplicavit* to the same effect from the High Court; see 4 Bl. Com., 253, *R. v. Doherty* (1810), 13 East, 171, and cases there cited; *ex parte King* (1754), Ambler, 240, 333.

³ 20 & 21 Vict., c. 85, ss. 27 and 16; and see Chap. VIII.

⁴ See Chap. VIII, s. 1 (b). ⁵ *Mytton v. M.* (1886), 11 P. D., 141.

⁶ *Cocksedge v. C.* (1844), 3 N. of C., 218.

⁷ *Tomkins v. T.* (1858), 1 Sw. & Tr., 168.

The petitioner ought to state certain acts which, if proved, should show that legal cruelty had been committed. There is no doubt as to the meaning of adultery, but cruelty in ordinary language is an ambiguous term.¹

Cruelty or *sævitia* was a cause for divorce *a mensa et thoro* in the Ecclesiastical Courts,² and recognised by the Canonists. From an early date decrees for divorce *a mensa et thoro* were given on this account.³

The evidence on cruelty is perhaps the most difficult to appraise of all matrimonial cases. Sir Cresswell Cresswell, J. O., observed thereon—

“The Legislature has in its wisdom confided the determination of such cases to a jury in place of the Court, upon which it formerly devolved; and a very difficult task it is. In the great variety of questions which in this country are referred to a jury, there are few so difficult to handle as the contentions of an unhappy marriage. In the common run of cases, the inquiry is spread over a limited range of time; the conclusion depends upon the converging effect of independent facts and witnesses, often largely fortified by written documents, and illustrated by the daily practice of trade or the ordinary events of life; and although the jury is often embarrassed by the collision of directly contrary testimony, they commonly receive much aid and support from those portions of the case that rest in writing, or are plainly and undeniably proved. They are seldom without some guide beyond the credibility of the parties themselves. But in cases of conjugal dispute, when cruelty is the issue, it is far otherwise. The domestic history of years is poured forth by husband and wife in alternate streams of opposite colours; the memory of each is ransacked for the most trivial details; the posture of each mind is antagonistic in the extreme, drawing memory or sometimes imagination after it in the attack or defence. Events are often misplaced in date, and always exaggerated in aspect. Unqualified accusations serve only to elicit absolute denials, and amidst a volume of evidence and at the end of a protracted investigation, the truth, obscured, disfigured, and transformed by prejudice and passion, is indeed hard to find. Nor does the nature of the case admit of much aid. Corroboration is seldom forthcoming. Those portions of times,

¹ *Suggate v. S.* (1859), 1 Sw. & Tr., 489.

² Ayliffe's *Pereragon*, tit. Divorce; Clarke's *Praxis*, tit. 107; Oughton, tit. 193, sec. 18; Sanchez, bk. x., disp. 18.

³ *Green's case* (1625), Cro. Car., 16; *Porter's case* (1637), *ib.*, 461.

which married people spend in quarrelling, are not their most public moments. If a third person becomes witness to their outbreaks it is generally a servant, and such persons generally enlist their feelings on one side or the other. Written evidence there is seldom any save letters, which, though they strongly illustrate the general love and feelings of the writers, seldom or never assist the proof of a disputed fact. So that in the result, the credibility of the parties themselves, their demeanour before the Court, and their general bearing in word and deed, come to be the sole materials out of which the decision must be constructed.”¹

The general definition of cruelty is—

“There must be an actual violence of such a nature as to endanger personal health or safety ; or there must be reasonable apprehension of it. The Court, as Lord Stowell once said, has never been driven off this ground. . . . The ground of the Court’s interference is the wife’s safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread.”²

“What merely wounds the mental feelings is in few cases to be admitted, where it is not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manner, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty.”³

Cruelty is usually a charge brought by the wife against the husband, but occasionally the husband sues on account of the wife’s cruelty ; and though no serious bodily injury be proved, yet if it be shown that she has an ungovernable temper, and when under the influence of

¹ *Scott v. S.* (1863), 3 Sw. & Tr., 319 ; and see *Tomkins v. T.* (1858), 1 Sw. & Tr., 168, as to former system contrasted with trial by jury.

² *Milford v. M.* (1866), L. R., 1 P. & M., 295 ; this definition of Lord Stowell in *Evans v. E.* (1790), 1 Hag. Con., 35, is continually cited. His Lordship in giving it relied on Clarke and other books of practices ; but generally both Lord Stowell and other judges have declined to give a strict legal definition of cruelty ; see *Curtis v. C.* (1858), 1 Sw. & Tr., 192. For instances of what is considered cruelty in the United States, see Report of Marriages and Divorces in U.S., 1867–1886. Published, 1889, 20,267, M. D., Chap. V of the Report.

³ *Evans v. E.*, *ubi sup.*, cited *Tomkins v. T.* (1858), 1 Sw. & Tr., 168 ; *Paterson v. P.* (1850), 3 H. L. C., 308 and elsewhere *passim*.

it, whether excited by drink or jealousy, is in the habit of assaulting the husband, it will amount to cruelty ; but in such cases provision by way of alimony will be made for the wife.¹

“Cruelty can only be described generally, and rather by effects produced than by acts done ;”² and aggravations of cruelty may arise from the station of the parties. Thus among labouring classes a blow and curse may be consistent with a married life in the main very happy ; but if a nobleman of high rank and ancient family uses personal violence to his peeress, such conduct in such a person carries with it something so degrading to the husband and so insulting and mortifying to the wife, as to render the injury far more severe and insupportable.² Also in the case of Lord Dysart, the husband’s conduct showed a want of consideration and of affection to his wife, and disregard of all her comforts, and compelled her to submit to great privations and hardships. Lord Dysart, who had an ample fortune, elected to live in a state of great misery, with a deficiency of the common necessities of life. He imposed extraordinary regulations on his wife, making her to do and endure things repellent to her feelings and inconsistent with her bringing up as a lady of position and with his station, and difficult to conform to. If she refused to comply, or com-

¹ *Kirkman v. K.* (1807), 1 Hag. Con., 409 ; *Furlonger v. F.* (1847), 5 N. of C., 422 ; *White v. W.* (1859), 1 Sw. & Tr., 591 ; *Prichard v. P.* (1864), 3 Sw. & Tr., 523 ; *Carnegie v. C.* (1886), 17 L. R. Ir., 430, C. A. ; in *Scott v. S.* (1860), Sea. & Sm., 133, it was dismissed ; see also *Goodden v. G.* (1892), P., 1, C. A., and *post*, Chap. XI, s. 1 ; and see *R. v. Crawford* (1845), 1 Den., 100, quoted at length pp. 478, 479. For curious instances of what is considered cruelty by wife to a husband in the United States, see U.S. Government Report on Marriage and Divorce from 1867–1886. Published 1889, 20,267, M. D., Chap. V of the Report.

² *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, pp. 69 and 73.

plained, he not only abused her, but, being a man of great strength, used instant force to compel her. For this the Court of Arches, though with some hesitation, granted a separation.¹

To give further definitions would complicate rather than elucidate this matter to the reader ; but the following illustrations of what has been held by the Court, or found by the jury, to be legal cruelty will, it is hoped, explain the matter.

A single actual intentional blow uncondoned is legal cruelty ; and if there is reasonable apprehension of its repetition, a decree will be granted ² *aliter* if not.³

“Everything is in legal construction *scævitia* which tends to bodily harm, and in that manner render cohabitation unsafe ; whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected. It is not necessary, in determining this point, to inquire from what motive such treatment proceeds. If the passions of the husband are so much out of his own control as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated. The law does not require there should be many acts. The Court is indisposed to interfere on account of one slight act, particularly between persons who have been under long cohabitation ; because if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it may be hoped and presumed that it will not be repeated. But if the one act should be of that description which should induce the Court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorise its interference.”⁴

The fact that a petitioning wife has already obtained securities of the peace against her husband, and that they are living separate, is no defence.⁵

¹ *Dysart v. D.* (1847), 5 N. of C., 194, 1 Rob. Ec., 470.

² *Reeves v. R.* (1862), 3 Sw. & Tr., 139 ; *Popkin v. P.* (1794), 1 Hag. Ec., 765, n., 768, n.

³ *Smallwood v. S.* (1861), 2 Sw. & Tr., 397.

⁴ *Holden v. H.* (1810), 1 Hag. Con., 453, Lord Stowell.

⁵ *Hulme v. H.* (1823), 2 Add., 27.

But an unintentional blow, however painful, is not cruelty. There is no fear of its repetition.¹

Or, for instance, where the wife vexatiously and unjustly refuses to give up the keys, on which a struggle takes place, and she is unfortunately bruised against the steps; this is an accident, and the hurt was not intentionally inflicted, and therefore it is not cruelty.²

Also it may be shown that it arises from the lunacy of the respondent; if so it will be an excuse, and no decree will be made; for although an insane husband is likely to be dangerous to his wife, the remedy lies in the restraint of the husband, not in the release of the wife.³

Still, if there is no cruel intention or spite in the husband, and the blows proceed from impulse or even from slight provocation, yet

“If the passions of the husband are so much out of his own control that it is inconsistent with the personal safety of the wife to continue in his society,”

if the husband is a person of ungovernable and excitable temper, a decree will be granted.⁴

As to rebutting evidence of general good conduct and amity between husband and wife, it has been said—

“What their common acquaintance and persons meeting them in society might observe is of little weight. It is much to be feared that husband and wife, particularly among the higher ranks, who from education and habit have some command over their external behaviour, often appear to the world to be mutually civil and kind, when at home by their own fireside they are but ill at ease with each other; and that

¹ *Neeld v. N.* (1831), 4 Hag. Ec., 263, p. 270; see *post*, as to drunkenness, p. 330.

² *Oliver v. O.* (1801), 1 Hag. Con., 361, p. 372.

³ *Hall v. H.* (1864), 3 Sw. & Tr., 347; *Hanbury v. H.* (1892), P., 222; and see *post*, p. 336; as to lunacy of a petitioner, see *post*, p. 337.

⁴ *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, p. 129, and *passim*; and see *post*, pp. 330, 336.

many a wife is often obliged to wear a countenance cheerful and clad in smiles, who carries with it and under it an aching heart.”¹

Et converso, if the evidence shows a malignancy of disposition in the husband,² or

“When it is established as a fact that a husband is desirous of compelling his wife to quit his roof, it is not very likely that he will be over-scrupulous in the adoption of means to attain that end;”³ and if the husband treat the wife with utter indifference, “these facts strengthen the probability of other evidence to acts of misconduct.”³

A husband kicking his wife while she was pregnant, and only a month before her confinement, threatening to disinherit the child, striking the wife on the breast so that it produced a very serious bruise, knocking her down in a French post-house, amount to cruelty even within the most restricted definition;⁴ and so also is pulling the wife by her hair out of the room and upstairs.⁵

A husband who was a guardian of the poor procuring his wife to be sent to the poorhouse, has been admitted in allegation as an act of cruelty.⁶ Threatening to send a sane wife to a madhouse is personal violence, justifying her in leaving the husband.⁷ Forcibly ejecting the wife from the house and turning her out of doors is cruelty.⁸ Cruelty to children in the wife’s presence in order to annoy her is admissible as evidence of cruelty.⁹

¹ *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, p. 98.

² *Wilson v. W.* (1848), 6 N. of C., 290.

³ *Saunders v. S.* (1847), 5 N. of C., 408, pp. 415, 416.

⁴ *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1.

⁵ *Lockwood v. L.* (1839), 2 Curt., 281, p. 287; in an earlier case dragging a wife by the hair was held not sufficient cruelty for a divorce; *Holmes v. H.* (1755), 2 Lee, 116.

⁶ *Evans v. E.* (1843), 2 N. of C., 470.

⁷ *Houliston v. Smyth* (1825), 2 C. & P., 22.

⁸ *Chesnutt v. C.* (1854), 1 Spinks, Ecc. & Ad., 196.

⁹ *Wallscourt v. W.* (1847), 5 N. of C., 121; *Suggate v. S.* (1859), 1 Sw. & Tr., 489; and see *Otway v. O.* (1887), 13 P. D., 12, 141; and *Sant v. S.* (1874), L. R., 5 P. C., 542.

*Habitual drunkenness*¹ in a spouse is not in itself cruelty, however much, like gaming or extravagance, it may be distressing to the petitioner;² but if the respondent's intemperance result in violence, showing a want of self-control and apprehension of bodily injuries to the wife in the future, a decree will be given, just as in criminal cases, if injuries are actually inflicted; drunkenness is not excuse. And assuming these injuries to be condoned, the drunken habits of the respondent will induce the Court to believe in the apprehension that they will be repeated.³

Forcing the wife to give up her separate property to the husband is not cruelty;⁴ the husband procuring a fictitious execution to be put into the wife's house is not cruelty.⁵

Constructive Cruelty.—Venereal disease,⁶ whether gonorrhea or syphilis, wilfully inflicted by the respondent on the petitioner, has always been considered an act of legal

¹ In the Inebriates Acts, 1879 and 1888, 42 & 43 Vict., c. 19; 51 & 52 Vict., c. 19, a habitual drunkard is defined as "a person who, not being amenable to any jurisdiction in lunacy, is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquors, at times dangerous to himself, herself, or to others, and incapable of managing himself or herself, and his or her affairs."

² *Brown v. B.* (1865), L. R., 1 P. & M., 46; *Evans v. E.* (1843), 2 N. of C., 470; *Scott v. S.* (1860), Sea. & Sm., 133.

³ *Marsh v. M.* (1858), 1 Sw. & Tr., 312; *Mytton v. M.* (1886), 11 P. D., 141; *Waddell v. W.* (1862), 2 Sw. & Tr., 584; *Power v. P.* (1865), 4 Sw. & Tr., 173; *Chesnutt v. C.* (1854), 1 Spinks, Ecc. & Ad., 196.

⁴ *D'Aguilar v. D'A.* (1794), 1 Hag. Ec., 773; and see *R. v. Middleton* (1819), 1 Chitty, 654.

⁵ *Simmons v. S.* (1847), 5 N. of C., 324, pp. 334, 335.

⁶ The author's apology for expatiating on this ground of cruelty is, that it sometimes happens that a wife who has been infected with a venereal disease by her husband, not merely does not know what she is suffering from, but even when so informed and treated for it by a medical man, is further ignorant that the wilful communication of such a disease by a husband is legal cruelty; see *Parkinson v. P.* (1869), L. R., 2 P. & M., 27.

cruelty in the Matrimonial Courts,¹ although it cannot be made the basis of criminal proceedings.²

It must be proved, not only that the petitioner is infected with the disease, but that the disease was inflicted by the respondent,³ and wilfully inflicted.

As to the wilfulness, the mere fact that a husband communicated disease to his wife is not sufficient to constitute legal cruelty; the act must be a wilful one.⁴

Lastly, that the respondent was suffering from venereal disease is evidence of adultery, especially if it shows itself long after the marriage;⁵ but the Judicial Committee of the Privy Council laid down that "the adultery of the husband must not be inferred from the mere fact that the wife is tainted with venereal disease, and is neither herself charged with adultery nor suspected of it. The existence of such a disease in the wife is consistent with the adultery of the husband, with her own adultery, and with accidental communication of the disease; and it will not be ascribed by preference to the first of these causes, even when the husband at a former time infected the wife, in the absence of proof that the husband was himself diseased at the time specified in the articles."⁶ If the wife has been unchaste, and her paramour is infected,

¹ It must, of course, be made out that it is venereal disease, and not an innocent complaint, as the itch; *Chesnutt v. C.* (1854), 1 Spinks, Ecc. & Ad., 196, pp. 197, 201; and see *Stone v. S.* (1844), 3 N. of C., 278, pp. 289, 290; and see *N. v. N.* (1862), 3 Sw. & Tr., 234.

² *R. v. Clurence* (1888), 22 Q. B. D., 23.

³ *Morphett v. M.* (1869), L. R., 1 P. & M., 702.

⁴ *Boardman v. B.* (1886), L. R., 1 P. & M., 233, citing the ruling of the full Court; *Jones v. J.* (1860), Sea. & Sm., 138; and *Ciocci v. C.* (1853), 1 Ecc. & Ad., 121; and see *Brown v. B.* (1865), L. R., 1 P. & M., 46.

⁵ *Popkin v. P.* (1795), 1 Hag. Ec., 765, n.

⁶ *Collett v. C.* (1840), 8 Monthly Law Mag., N. of C., 158, reversing *ib.*, 1 Curt., 678.

the burden of proof shifts, and it is for the wife to show that the husband contracted the disorder from the contamination of another person than herself.¹

That the husband has had connection with the wife unnaturally has been alleged a cruelty, but the charge has never been proved.²

Spitting in the spouse's face is legal cruelty.³

The respondent husband bringing home prostitutes to the matrimonial home, or committing adultery with servants, has, where it preyed on the wife's health, been held cruelty ;⁴ and the respondent's incest has also been alleged as cruelty.⁵

The respondent husband falsely charging the petitioner wife with incest,⁶ and sometimes with adultery,⁷ has been held cruelty.

As to denial of conjugal rights being cruelty, see *ante*, Chap. IV, p. 171.

Moral Cruelty.—As a general rule cruelty is constituted by actual physical violence. But even without actual violence, cruelty may be constituted first by threats of personal violence, not mere words of abuse, but threats which there is a probability of their being carried into

¹ *King v. K.* (1847), 5 N. of C., 244, pp. 252-255.

² *Geils v. G.* (1848), 6 N. of C., 97 ; *N. v. N.* (1862), 3 Sw. & Tr., 234 ; and see Chap. IV, *ante*, p. 173, and *post*, pp. 350, 351.

³ *D'Aguilar v. D'A.* (1794), 1 Hag. Ec., 773, p. 776, n. ; *Saunders v. S.* (1847), 5 N. of C., 408, p. 418 ; *Curtis v. C.* (1858), 1 Sw. & Tr., 192, p. 197 ; *Waddell v. W.* (1862), 2 Sw. & Tr., 584. A wife spitting in her husband's face, whereupon he kills her, may reduce the killing from murder to manslaughter ; *R. v. Smith* (1866), 4 F. & F., 1066.

⁴ *Swatman v. S.* (1865), 4 Sw. & Tr., 135 ; but see *per contra*, *Cousen v. C.* (1865), *ib.*, 164, where the previous authorities are reviewed ; and see *per contra*, *Beauclerk v. B.* (1891), P., 189, C. A. ; and see *Houlston v. Smyth* (1825), 2 C. & P., 22.

⁵ *Gale v. G.* (1852), 2 Rob. Ec., 421.

⁶ *Bray v. B.* (1828), 1 Hag. Ec., 163.

⁷ *Durant v. D.* (1825), 1 Hag. Ec., 733, pp. 759, 760, 769 ; see *Wilson v. W.* (1848), 6 N. of C., 290.

execution, and a reasonable appearance of bodily hurt;¹ or secondly, by any conduct of the other party by which the petitioner's health has suffered *per quod consortium amittitur*.²

But in a case where a clergyman adopted towards his wife what he called affectionate discipline, but which, as the result, broke down her health, the full Court of Divorce granted a judicial separation for cruelty. In this case the full Court adopted the Judge Ordinary's declaration of the law—

"The peculiar and distinguishing feature of this case is the adoption by the respondent of a deliberate system of conduct towards his wife with view of bending her to his authority. . . . If force, whether physical or moral, is systematically exerted for this purpose, in such a manner, to such a degree, and during such a length of time as to break down her health and render serious malady imminent, the interference of the law cannot justly be withheld by any Court which affects to have charge of the wife's personal safety."

And the full Court observed—

"The object of the Matrimonial Court in exercising its jurisdiction in decreeing a judicial separation for cruelty, is to free the injured consort from a cohabitation which has been rendered, or which there is imminent reason to believe will be rendered, unsafe by the ill-usage of the party complained of. . . . The most frequent form of ill-usage which amounts to cruelty is that of personal violence, but the Courts have never limited their jurisdiction to such cases alone."

And Lord Penzance, J. O., observed—

"In cases of this kind everything depends on degree. Many acts which are venial in themselves become reprehensible as parts of a system. Others, justifiable on occasions, lose their justification when continuously and purposely repeated. In considering a charge of cruelty, therefore, the conduct of the party inculpated can only be justified, or the reverse, as a whole. And if, upon a general review, the

¹ *Evans v. E.* (1790), 1 Hag. Con., 35; *D'Aguilar v. D'A.* (1794), 1 Hag. Ec., 775, n., 776, n.; *Otway v. O.* (1812), 2 Phillim., 95; *Hulme v. H.* (1823), 2 Add., 27; *Bostock v. B.* (1858), 1 Sw. & Tr., 221.

² See *D'Aguilar v. D'A.* (1794), 1 Hag. Ec., 773; *Kelly v. K.* (1869), L. R., 2 P. & M., 31 and 59.

Matrimonial Court is of deliberate opinion that cohabitation could not be resumed with safety to the wife, it is bound by the dictates of common sense, as well as upon principles repeatedly avowed and acted upon in a long series of decisions, to step in and forbid its resumption. No doubt in such cases as the present, where the personal violence used is of a trifling character, it behoves the Court to be sedulous in inquiry and slow in conviction. It should be entirely satisfied that the conclusion of the wife's danger is clearly reached, and on reliable evidence."

In this case the full Court assumed that no actual physical violence had taken place, but relied upon the moral cruelty. The facts were (and they are so peculiarly interesting an instance of moral cruelty that they are quoted at length) that after twenty-five years of married life the respondent husband at the close of 1867 took up the idea—

"That his wife was plotting and conspiring against him. He commenced opening her letters, and calling her a vile traitor and apostate. He told her that no modest woman would associate with her; that she had given her confidences to another man: he refused to sit at the table with her; he insisted on occupying a separate bedroom; he told his servant to take orders from him and not from his wife; he kept apart from his wife all day, except at family prayers, and even then he appears to have little or no communication with her, except in the way of rebuke or reproach. At length in May 1868 the petitioner became ill. her appetite wholly failed; she lost the senses of taste and smell, and towards the end of that month felt a sensation of numbness in her, which gave reason to fear paralysis. She consulted Dr. Drysdale. He advised her to leave home; her husband refused, and on the 29th of June, having become worse, she left her home without his consent."

She then travelled with relations in Wales and Ireland for four months, and returned home October 1868. On her return—

"Mrs. Kelly was entirely deposed from her natural position as mistress of her husband's house. She was debarred the use of money. Not only were the household expenses withdrawn from her control, but she was not permitted to disburse any for her own necessary expenses. Every article of dress, every trifle that she required, had to be put down on paper, and her husband provided it if he thought proper. Having on one occasion of going into town declined to tell her husband on her

return every house to which she had been, an interdict was placed on her going out at will. At one time the doors were locked to keep her in ; at another a man-servant was deputed to follow her ; at another the appellant accompanied her himself whenever she wanted to go abroad. On these occasions he appears to have occupied the short time they were together in what he called putting her sin before her in strong, coarse, and abusive terms, applying to her the same epithets and language as would be applicable to a woman who had been guilty of adultery. He took no meals with her ; he occupied a separate bedroom ; he passed no portion of the day, however small, in her society. They met, as before, at family prayers, and if he spoke to her at all, it was only to give some direction, or to reproach her. Save on one or two occasions she saw no one. Those whom she desired to see were forbidden the house. She was absolutely prohibited from writing any letters unless her husband saw them before they were posted. She was thus, as far as the appellant could achieve it, practically isolated from her friends. Meanwhile the care of the household was confided to a woman hired for that purpose, who was directed not to obey Mrs. Kelly's order without the respondent. In fact, she was treated like a child or a lunatic, and thus, be it remembered, although she had passed the mature age of sixty years, and had been married to the appellant for seven and twenty years."

And, said the full Court, they were satisfied the effect of the treatment on Mrs. Kelly before she left for Wales was such

"As to cause change of air and scene and absence from her husband to be necessary, and that from the treatment she suffered after her return from Ireland her health was so broken down that to continue subject to the same treatment for any length of time would not only have seriously imperilled her health, but would have exposed her to the highly probable consequences mentioned by the medical man, viz. paralysis or madness."

The full Court, after examining the counter-charges brought by Mr. Kelly against his wife, and pronouncing them to be in most cases either entirely unfounded or trivial—

"And in those few cases in which her conduct may not be entirely free from blame, that her acts were the consequence and not the cause of her husband's ill-treatment, and whether taken separately or collectively, afford no justification for it ;"

And in the result they were satisfied

“Of the extreme peril to which Mrs. Kelly's health was exposed without any adequate fault of her own,”

gave a judicial separation.¹

And Butt, Pres., laid down—

“Although I am not aware that there were any blows, still, if the conduct of the husband (a persistent case of harsh, irritating conduct) be such as to endanger the life, or even the health of the wife, that is cruelty in every sense of the word, whether we talk of ‘legal cruelty’ or anything else.”

In this case the respondent husband admitted he was drunk and disorderly, and the evidence showed that the wife left his house in terror, the servant girl ran out into and remained in the garden through fear, and the wife, in consequence, left her husband; the Court held that she left her home in bodily fear, and was justified in leaving it, and gave a judicial separation.²

If the harsh behaviour of the husband, from which the wife suffered, arose out of a disordered state of the brain which was permanent, and rendered him liable to fits of ungovernable passion, this will not prevent the Court, which considers the wife's safety, giving a decree.³

Provocation.—Lastly, as to the cruelty to the petitioner, it must be shown that such ill-usage was not provoked by the petitioner's misconduct or temper. For, said Lord Penzance, J. O., and the full Court adopted this—

“The decisions of my predecessors have imported this further pro-

¹ *Kelly v. K.* (1869), L. R., 2 P. & M., 31 and 59; followed *Bethune v. B.* (1891), P., 205.

² *Mytton v. M.* (1886), 11 P. D., 141; in this case the respondent husband said, shaking his fist in her face, “that being a lawyer he knew the law too well to commit actual violence;” see similar expressions, Chap. IV, p. 176; and as to drunken violence, see p. 330.

³ *Curtis v. C.* (1858), 1 Sw. & Tr., 192; and see *Hanbury v. H.* (1892), P., 222, and *ante*, p. 328.

position as a condition of the Court's interference, that the troubles of the wife are not owing to her own misconduct." ¹

If a wife can ensure her own safety by lawful obedience, and by a proper self-command, she has no right to come here ; ² and it has been laid down that it is not necessary that the conduct of the wife should be entirely without blame, for the reason which would justify the imputation of blame to the wife would not justify the ferocity of the husband. ³

The husband must explain what acts of the wife he relies on to prove justification of his cruelty ; mere drunkenness or insolence is not enough. ⁴

The Court will not assume provocation ; it is for the respondent to set up and prove it. ⁵

If the respondent sets up that the petitioner is a lunatic, and that the force actually used was only what was necessary for the petitioner's protection, and was applied under proper medical advice, this is a defence ; ⁶ but if the petitioner is sane, then detention or threatened detention in a lunatic asylum is personal violence. ⁷

(d) *Desertion*

"Desertion without reasonable excuse for two years

¹ *Kelly v. K.* (1869), L. R., 2 P. & M., 31 and 59 ; and see *Waring v. W.* (1813), 2 Hag. Con., 153 ; *Best v. B.* (1823), 1 Add., 411 ; *Walls-court v. W.* (1847), 5 N. of C., 121.

² *Dysart v. D.* (1847), 1 Rob. Ecc., 470 ; *Taylor v. T.* (1755), 2 Lee, 172 ; *Waring v. W.* (1813), 2 Phillim., 132.

³ *Holden v. H.* (1810), 1 Hag. Con., 453.

⁴ *Shaw v. S.* (1861), 2 Sw. & Tr., 515 ; and see *Pearman v. P.* (1860), 1 Sw. & Tr., 601 ; and see *Hughes v. H.* (1866), L. R., 1 P. & M., 219.

⁵ *Lockwood v. L.* (1839), 2 Curt., 281, p. 286.

⁶ *R. v. Mackenzie* (1766), 3 Burr., 1922 ; but a husband or wife ill-treating a lunatic spouse in their charge is criminally punishable by the Lunacy Act, 1890, 53 Vict., c. 5, s. 322, making *R. v. Rundle* (1855), 6 Cox C. C., 549, no longer law. He is not entitled as of right to her custody, *re Davy* (1892), W. N., 124.

⁷ *Houlston v. Smyth* (1825), 2 C. & P., 22.

and upwards" by the husband, coupled with his adultery, is a ground for dissolution in a suit by the wife;¹ and desertion without cause for two years and upwards, by either husband or wife, is a ground for judicial separation in a suit by either husband or wife.² But in all parts of the Act (except s. 21, relating to protection orders) desertion must be held one and the same thing.³ Therefore decisions as to desertion in suits for judicial separation apply to desertion in suits for dissolution of marriage, and *vice versa*. As regards desertion in connection with protection and maintenance orders, see Chap. VIII, s. 3, Chap. IX, ss. 2, 4; and as to remedy for desertion by way of restitution of conjugal rights, see Chap. X, s. 1. Desertion is also a fact creating a discretionary bar; see *ante*, s. 4 (e) (f), pp. 295, 297.

Desertion is a new matrimonial offence, created by the Matrimonial Causes Act, 1857, and not transferred from the old jurisdiction of the Ecclesiastical Courts.⁴

Doctrine and Definition.—As to what is "desertion," it must be first pointed out that mere separation is not desertion.⁵ If either husband or wife quit company by mutual consent, or go away for health or business, this is not desertion.

"No one can desert who does not actually and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home.

¹ 20 & 21 Vict., c. 85, s. 27.

² *Ib.*, s. 16; *Millar v. M.* (1883), 8 P. D., 187; and see Chap. VIII, s. 1 (b), and Chap. IX, s. 2 (a), s. 4 (a).

³ Per Lord Penzance, *Yeatman v. F.* (1868), L. R., 1 P. & M., 489; *Cargill v. C.* (1858), 1 Sw. & Tr., 235.

⁴ *Thompson v. T.* (1858), 1 Sw. & Tr., 231; *Brookes v. B.*, *ib.*, p. 326. Even malicious desertion was no bar in the old Ecclesiastical Courts; see *ante*, s. 4, p. 295, n. 4, Chap. VIII, s. 2 (c).

⁵ But separation may amount to a bar or wilful neglect conducing to the adultery; see *ante*, s. 4 (f), p. 297.

Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.' But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion' in my judgment becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call on the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of desertion without cause."¹

*Separation Deed.*²—So if the separation takes place under a separation deed, that usually deprives it of the character of desertion.

If the wife bargains away her right to relief by executing a separation deed, allowing her husband to live apart, she cannot subsequently complain of being deserted without cause by him. Even if the separation deed is void and invalid, that will not make a voluntary separation "desertion," or if the husband does not pay her what he agreed to pay, for—

"The husband's breach of contract could not by relation back make the parting involuntary which was in fact voluntary, though the volition of the wife was moved by the husband's promises. The separation, it must always be remembered, was an act done under the deed; and though the deed be void, or its covenants afterwards broken, it would be most unjust to treat that act as if the deed had never existed. The failure of the deed cannot be held so as to react upon the separation for which it provided, as to impress upon the separation a character entirely opposite to that which it bore at the time. If it could, it might as well be said that the wife had deserted her husband as that he had deserted her."³

¹ *Fitzgerald v. F.* (1869), L. R., 1 P. & M., 694; and see *Millar v. M.* (1883), 8 P. D., 187.

² Separation deeds are here considered as negating desertion; as estoppel to suing for other matrimonial offences, they are considered *ante*, s. 3, and they are also discussed Chap. IV, p. 200, and pp. 256, 258, 259, 271, 272, 275, 284.

³ *Crabb v. C.* (1868), L. R., 1 P. & M., 601; *Parkinson v. P.* (1869), L. R., 2 P. & M., 25; *Buckmaster v. B.* (1869), L. R., 1 P. & M., 713.

It may be that in certain cases a separation deed will not prevent the cessation of cohabitation being desertion, as where a separation deed was executed, being obtained without the real concurrence or assent of the other party to the separation;¹ this, however, must be distinguished from cases where there was a consent, although an unwilling consent.²

As, for instance, in the case of *fraud*—

“If a man, determining to desert his wife, were to set about fraudulently, by the show of agreement which he never intended to fulfil, covering his true purpose under delusive covenants, and seeking a shield for a design in a consent bought by treachery.”³

Or where a wife for a few months, from mere compassionate feeling, because the husband said he was starving, made him an allowance which she afterwards stopped because she thought that by continuing the payment she was encouraging him to keep apart from her. She often wrote to him, asking to resume cohabitation, but he refused. The Court held that there was nothing like an assent or agreement on her part to his staying away from her, and she had therefore made out a case of desertion.⁴

The mere fact that one party makes to the other a pecuniary allowance will not, supposing the separation otherwise amounts to desertion, alter its legal effect; for

“A husband who withdraws from cohabitation with his wife may be guilty of desertion although he continues to support her. A wife is entitled to her husband’s society, and the protection of his name and home, in cohabitation. The permanent denial of these rights may be

¹ *Dagg v. D.* (1882), 7 P. D., 17; and see also *Moore v. M.* (1887), 12 P. D., 193, where the wife got a judicial separation for desertion notwithstanding a separation.

² See *Ross v. R.* (1869), L. R., 1 P. & M., 734; and see *ante*, p. 272.

³ *Crabb v. C.* (1868), L. R., 1 P. & M., 601, *obiter dictum* by Lord Penzance.

⁴ *Nott v. N.* (1866), L. R., 1 P. & M., 251; distinguished *Parkinson v. P.* (1869), L. R., 2 P. & M., 25.

aggravated by leaving her destitute, or mitigated by a liberal provision for her support; but if the cohabitation is put an end to without the consent of the wife, and without the intention of renewing it, the matrimonial offence of 'desertion' is in my judgment complete."¹

*Imprisonment.*²—Imprisonment of the respondent in gaol for a criminal offence, however long the term of the sentence may be, is not desertion. For

"It is essential to the constitution of desertion that there should be a voluntary abandonment by the husband of the society of the wife against her will."

In this case the respondent, having committed a criminal offence, absconded in November 1866, with the consent of the petitioner, in order to avoid arrest. He was, however, arrested and imprisoned; soon after the expiration of his sentence he was again imprisoned, and at last received a term of penal servitude. He continued throughout his imprisonment to write affectionate letters to his wife, and when out of gaol endeavoured to resume cohabitation, which she declined; the Court, though holding that her refusal was justifiable, declared that he was not guilty of desertion.³ If, however, the circumstances under which the respondent left the petitioner amounted to desertion in the first instance, the fact that the respondent was subsequently arrested and imprisoned, and so prevented resuming cohabitation, will not deprive the desertion thus commenced of its original character, and at the expiration of the two years the petitioner can claim relief therefor.⁴

Separation subsequently becoming Desertion.—A separa-

¹ *Yeatman v. Y.* (1868), L. R., 1 P. & M., 489; and see *Macdonald v. M.* (1859), 4 Sw. & Tr., 242; and see *ante*, s. 4, p. 296.

² And see also at Conviction for Felony, *ante*, s. 4 (b), pp. 292, 293, and (e), (f), pp. 296, 297, 298, and *post*, p. 348.

³ *Townsend v. T.* (1873), L. R., 3 P. & M., 129.

⁴ *Drew v. D.* (1888), 13 P. D., 97.

tion which did not amount to desertion in the first instance may afterwards become desertion.

“There are cases in which the parties may have innocently ceased for a time to be actually living together, separated by the calls of everyday life or the exigencies of public duty, and the husband or wife taking advantage of the separation may have purposely rejected all subsequent opportunities of coming together again, and this may constitute desertion. For, in truth, in such cases the state of cohabitation was not in the first instance wholly relinquished, but only suspended till a fitting occasion for its resumption, and purposely to reject all such occasions is practically to abandon it.”¹

The most usual cause of separation turning into desertion is adultery by the deserter.

As, for instance, when the husband emigrated to follow his profession as a doctor, which he did in various places for several years, corresponding with and from time to time meeting his wife, but later began to commit adultery with Mrs. Thain, who went to live with him as the mistress of his house; it was held that the desertion began, not when they ceased to cohabit, but when he made up his mind to abandon the wife and live with another woman.²

Adultery ripening into Desertion.—If a man is living with another woman, the wife is justified in leaving him and saying to him—

“I shall not return to you, nor shall I allow you to have access to me, while you are living in open adultery with another woman.”

And if this continues for two years, so that there never is a time at which the petitioner is bound to go back and

¹ *Fitzgerald v. F.* (1869), 1 P. & M., 694.

² *Gatehouse v. G.* (1867), L. R., 1 P. & M, 331; and see *Lawrence v. L.* (1862), 2 Sw. & Tr., 575; and *Wood v. W.* (1887), 13 P. D., 22; but adultery does not always turn separation into desertion; see *Keech v. K.* (1868), L. R., 1 P. & M., 641; *Townsend v. T.* (1873), L. R., 3 P. & M., 129; in both cases the respondent made a *bonâ fide* offer to return to cohabitation previous to committing adultery; and see also *Lodge v. L.* (1890), 15 P. D., 159.

cohabit, for she is justified in refusing to do so as long as the adulterous cohabitation continues, the petitioner will be entitled to a decree;¹ if, however, the respondent, having broken off his adulterous cohabitation, makes a *bonâ fide* offer to resume cohabitation, the desertion will terminate, and though the petitioner might get a judicial separation for adultery, she will not be entitled to dissolution for adultery with desertion.²

Refusal after Separation to resume Cohabitation.—But supposing the state of separation to exist, neglect or refusal to resume cohabitation will not convert the separation into desertion, although either party has the right to call on the other to resume cohabitation, and if refused, to bring an action for restitution (unless estopped by separation deed, see Chap. X, s. 1). “Such refusal cannot be the offence intended by the statute under the name of desertion without cause.”³ In this case Major and Mrs. Fitzgerald in 1861 had their conjugal home at Braydon Hall; both were temporarily absent from it, he for a month at Cowes, she for a few days in London. She there received information which led her to believe that her husband had committed adultery, and immediately refused to return home or cohabit; and subsequently instituted a suit founded on adultery and cruelty, which failed. After this neither attempted to resume cohabitation; but in 1868 she commenced a suit, charging, together with adultery, which was proved, desertion. But the Court held that neither Major Fitzgerald’s conduct in

¹ *Knapp v. K.* (1880), 6 P. D., 10; *Blandford v. B.* (1883), 8 P. D., 19; *Farmer v. F.* (1884), 9 P. D., 245; *Wood v. W.* (1887), 13 P. D., 22; *Garcia v. G.* (1888), 13 P. D., 216; *Lappington v. L.* (1888), 14 P. D., 21; and see *Houlston v. Smyth* (1825), 2 C. & P., 22; and *Harding v. H.* (1886), 11 P. D., 111.

² *Lodge v. L.* (1890), 15 P. D., 159.

³ *Fitzgerald v. F.* (1869), L. R., 1 P. & M., 694.

1861, when going to Cowes, nor his subsequent failure to resume cohabitation, constituted desertion.

‘It is one thing to make a breach, it is another to refrain from attempts to heal it. Desertion means abandonment, and implies an active withdrawal from cohabitation that exists; the word carries with it an idea of forsaking or leaving, and is hardly satisfied by the negative position of standing apart.’¹

Refusal to obey a decree for restitution of conjugal rights is desertion for two years. The Matrimonial Causes Act, 1884,² provides—

“If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and . . . when any husband who has been guilty of desertion by failure on his part to comply with a decree for restitution of conjugal rights has also been guilty of adultery, the wife may forthwith present a petition for dissolution of her marriage, and the Court may pronounce a decree *nisi* for the dissolution of such marriage on the ground of adultery coupled with desertion.”

Such desertion may be coupled with adultery either before or after the decree for restitution, so as to form ground for dissolution on a wife’s petition.³

Commencement of Desertion.—As the desertion, to be a ground of relief, must have lasted two years,⁴ it is important to fix its commencement. When the husband actually leaves the wife’s society, the desertion commences from that moment; but if the cessation of

¹ *Fitzgerald v. F.* (1869), L. R., 1 P. & M., 694; and see *Williams v. W.* (1864), 3 Sw. & Tr., 547; and *R. v. Leresche* (1891), 2 Q. B., 418, C. A.; *Mahoney v. M’Carthy* (1892), P., 21; see Chap. IX, ss. 2, 4. In such a case the proper course is to bring an action for restitution, see Chap. X, s. 1; and if after decree the respondent then refuses to obey and cohabit, he or she is guilty of desertion.

² 47 & 48 Vict., c. 68, s. 5; and see *Harding v. H.* (1886), 11 P. D., 111; and Chap. VIII, s. 1 (b), p. 353, and Chap. X, s. 1 (c), p. 377.

³ *Bigwood v. B.* (1888), 13 P. D., 89.

⁴ Except in the case of refusal to obey a decree of restitution of conjugal rights, which constitutes at once the full offence of desertion for two years. See Chap. X, s. 1, and *supra*.

cohabitation was in the origin merely a separation, subsequently became desertion, see *ante*, p. 341, the desertion will commence from the moment when the deserter made up his mind to abandon his or her spouse and to enter on adulterous intercourse;¹ or in the converse case, from the moment when the petitioner, having found out the respondent was living in adultery, declined to cohabit.²

Termination of Desertion.—The desertion may be brought to an end before the expiration of the two years by actual resumption of cohabitation, or by a *bonâ fide offer to return to cohabitation*. If desertion has once commenced, a *bonâ fide* offer by the deserter to return to cohabitation, made before two years have elapsed from the date of desertion present, takes away the character of desertion, from the act, and precludes the other party from relying for relief on such desertion; yet such offer must be *bonâ fide*. If the respondent was, at the time of making such offer, cohabiting in adultery with some woman, the offer will not be considered sincere, for the petitioner would not be bound to receive back an adulterous husband;³ but it is for the petitioner to show that the offer is not *bonâ fide*.⁴ But the refusal by the petitioner of the respondent's *bonâ fide* offer will not constitute desertion by the petitioner unless the circumstances under which the cohabitation originally ceased constituted desertion by the petitioner.⁵ If the offer to return is made after two years of desertion have elapsed,

¹ *Gatehouse v. G.* (1867), L. R., 1 P. & M., 331; for facts of this case see *ante*, p. 342; *Wood v. W.* (1887), 13 P. D., 22.

² *Farmer v. F.* (1884), 9 P. D., 245; *Garcia v. G.* (1888), 13 P. D., 216.

³ *Mallinson v. M.* (1866), L. R., 1 P. & M., 93.

⁴ *Lodge v. L.* (1890), 15 P. D., 159; and see *Harding v. H.* (1886), 11 P. D., 111.

⁵ *Fitzgerald v. F.* (1869), L. R., 1 P. & M., 694; and see *ante*, Separation becoming Desertion, p. 341; and *post*, Reasonable Excuse for Desertion, p. 346.

this will affect or deprive the petitioner of a right to a remedy already completed.¹

As to a written request by a petitioner, or offer by the respondent in a suit for restitution of conjugal right to resume cohabitation, see Chap. X, s. 1.

Reasonable Excuse.—Lastly, assuming that there is desertion, it should be shown that the desertion was “without reasonable excuse,” as in s. 27 of the Matrimonial Causes Act, 1857, or “without cause,” as in s. 16 thereof, which means “reasonable cause,” and is identical with “reasonable excuse.”

“According to the matrimonial law of this country . . . nothing will justify a man in refusing to receive his wife, except the commission of some distinct matrimonial offence, such as adultery and cruelty, upon which the Court could found a decree of judicial separation.” But the full Court of Divorce has “decided that conduct falling short of a matrimonial offence, sufficient to found a decree for judicial separation, was still sufficient ‘cause’ to bar all remedy to a wife whom her husband has deserted.” But “the cause should be grave and weighty which, in the judgment of the Court, should deprive a deserted wife of her remedy for that desertion.” “It would be of evil example to hold that mere frailty of temper, unless shown in some marked and intolerable excesses, was reasonable ground to justify a man in throwing a young wife on the world without the protection of his home or society.”²

The usual justification for the desertion is adultery or suspicion of adultery. For if a husband is living in adultery, the wife is justified in refusing to cohabit; and although, as a matter of fact, it is she who leaves the common home and breaks off relations, yet she is not deserting, but, on the contrary;³ if the husband’s adultery continues, it will, after two years, unless stopped by a

¹ *Cargill v. C.* (1858), 1 Sw. & Tr., 235; *Basing v. B.* (1864), 3 Sw. & Tr., 516; and see *Brookes v. B.* (1858), 1 Sw. & Tr., 326.

² *Yeatman v. F.* (1868), L. R., 1 P. & M., 489; without reasonable excuse qualifies desertion; *Haswell v. H.* (1859), 1 Sw. & Tr., 502.

³ *Graves v. G.* (1864), 3 Sw. & Tr., 350; and see *Houlston v. Smyth* (1825), 2 C. & P., 22; and see *ante*, p. 342.

bonâ fide offer to return to cohabitation, ripen into desertion; see *ante*, p. 342. Nay, if a petitioner suspects the other party of a matrimonial offence, it is his or her duty to separate forthwith, lest he or she be barred by condonation; see *ante*, s. 3 (d), pp. 277, 278, where the proper course to be adopted on suspicion of adultery is discussed. If, however, the suspicion turns out unfounded, and the petitioner loses the case, it does not therefore prove that separation was unjustified.

"She failed to establish her husband's guilt to the satisfaction of the jury and of the Court. But it is not inconsistent with that to allege that she had reasonable grounds for suspecting her husband as to warrant her in withdrawing from cohabitation until her suspicions were confirmed or dispelled."¹

Further, as above explained, acts other and less than adultery will be a reasonable cause for desertion.²

So acts of familiarity and indecent liberties permitted or practised by one party will, although not amounting to adultery, justify the other party in separating.³ And where the petitioner had been deceived into a marriage by the misrepresentations of the respondent, and she turned out to be pregnant at the date of the marriage, and on discovering this he refused to cohabit; this was held a reasonable cause for desertion; and on his proving subsequent adultery he had a decree.⁴

Cruelty generally authorises either spouse in leaving the other.⁵

¹ Per Lord Penzance, *Fitzgerald v. F.* (1869), L. R., 1 P. & M., 694; but in *Duplony v. D.* (1892), P. 53, Jeune, J., held that separation caused by a suspicion of adultery which turns out unfounded is desertion without reasonable cause.

² See *Tempany v. Hakewill* (1858), 1 F. & F., 438.

³ *Haswell v. H.* (1859), 1 Sw. & Tr., 502.

⁴ *Kennedy v. K.* (1890), 62 L. T., 705.

⁵ See *ante*, p. 323, as to cruelty; and see *Houlston v. Smyth* (1825), 2 C. & P., 22, where the husband threatened to shut up the wife as a lunatic, and she was held justified in leaving him.

Drunkenness and breaking of furniture by a wife does not justify a husband in deserting her.¹

Apparently, if one of the spouses becomes a convict, this does not justify the other party in refusing to cohabit during such time as the criminal is out of gaol.² Although, if the husband becomes an outlaw or is banished the realm, the wife need not follow him, and she becomes a *feme sole*.³

Refusal to consummate by the other party has been held an excuse for desertion. In this case the marriage had admittedly never been consummated; the petitioner had separated from his wife, and she had cohabited with the correspondent and had a child by him. The respondent wife set up the petitioner's desertion without reasonable cause, and that he had thereby been guilty of wilful neglect and misconduct, conducing to her adultery. The petitioner swore that he was always ready and willing, but that his wife refused to allow him to consummate, and that this refusal on her part was the cause of his separating. She swore that the marriage had never been consummated in consequence of the incapacity of the petitioner, and that she therefore considered it null and void. Neither party sued for nullity; but the petition was for dissolution, to which the wife set up desertion in bar. Lord Hannen, J. O., said—

“I think I am justified on the evidence before me in saying that it may well have been a matter of doubt between the two persons on which side the fault or physical defect lay. In such state of things, I think that the husband, taking the view that the fault was not with himself but with his wife, and in that state of mind coming to the conclusion

¹ *Heyes v. H.* (1887), 13 P. D., 11; *Scott v. S.* (1860), Sea. & Sm., 133.

² Per Lord Hannen, Pres., *Williamson v. W.* (1882), 7 P. D., 76; Corpus Juris Canonici Decretal, bk. iv., 19. 3; but see *Townsend v. T.* (1873), L. R., 3 P. & M., 129; and see *ante*, pp. 291, 297, 341, as imprisonment.

³ Bl. Com., bk. i., p. 443; and see *ante*, Chap. IV, p. 166.

that the connection between them was intolerable, leading to misery and not to happiness, because the wife was either unable or resolutely unwilling to consummate, and therefore leaving her, cannot be said to have been guilty of such desertion as is contemplated by the statute ;”

and the petitioner had his decree *nisi*.¹

If one of the spouses is a minor, dependent on his or her parent, and after the marriage, into which he or she has been entrapped, is separated from the other spouse, either by order of the Court of Chancery² or by the parents, this will be a reasonable cause for the separation.³

(e) *Bigamy with Adultery*

“Bigamy with adultery” by a husband during the marriage is a ground for dissolution ; and

“Bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.”⁴

A second bigamous marriage of the respondent must be proved ; it is not sufficient to prove a conviction for bigamy.⁵ Further, besides the proof of bigamy, the petitioner must prove cohabitation by the respondent with the woman with whom the respondent went through the ceremony of marriage.⁶

(f) *Incestuous Adultery*

“Incestuous adultery” by a husband during the marriage

¹ *Ousey v. O.* (1874), L. R., 3 P. & M., 223 ; and see *ante*, pp. 295, 297.

² *Beavan v. B.* (1862), 2 Sw. & Tr., 652 ; and see *ante*, p. 299.

³ *Du Terreaux v. Du T.* (1859), 1 Sw. & Tr., 555 ; *Proctor v. P.* (1865), 4 Sw. & Tr., 140 ; and see *ante*, pp. 296, 297.

⁴ 20 & 21 Vict., c. 85, s. 27.

⁵ *March v. M.* (1858), 2 Sw. & Tr., 49 ; and see *Burt v. B.* (1860), 2 Sw. & Tr., 88 ; and see *ante*, Chap. III, pp. 132, 133, and Chap. XV, s. 3.

⁶ *Horne v. H.* (1858), 2 Sw. & Tr., 48.

is a ground for dissolution. "Incestuous adultery means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract matrimony, by reason of her being within the prohibited degrees of consanguinity or affinity."¹ This includes illegitimate relations of the wife; see *ante*, Chap. II, p. 30. The usual incest committed by a husband is adultery with the wife's sister;² but in one case a husband eloped with his mother-in-law.³ Condoned incestuous adultery is revived by adultery not incestuous.⁴ Incest is a spiritual offence, reserved for the exclusive cognisance of the Spiritual Court by the statute *Circumspecte Agatis*, punishable in a criminal suit by public penance, excommunication, or six months' imprisonment.⁵

(g) *Rape, Sodomy, Bestiality*

If the husband during the marriage has been guilty of rape, or sodomy, or bestiality, either of these is a ground for dissolution.⁶

¹ 20 & 21 Vict., c. 85, s. 27.

² *Stoker v. S.* (1889), 14 P. D., 60; *Newman v. N.* (1870), L. R., 2 P. & M., 57; *Newsome v. N.* (1871), L. R., 2 P. & M., 306.

³ A case of divorce on a wife's petition, grounded on the respondent's incestuous adultery with his mother-in-law, was reported in the Times some years ago. The author cannot now find the reference; he would be obliged if one of the readers would furnish him with it.

⁴ *Newsome v. N.*, *ubi sup.*

⁵ Gibson's Codex, p. 1085; *Harris v. Hicks* (1694), 2 Salk., 548; *Burgess v. B.* (1804), 2 Hag. Con., 223, 53 Geo. III, c. 127, s. 3; *Blackmore v. Brider* (1816), 2 Phillim., 359; *Griffiths v. Reed* (1828), 1 Hag. Ec., 195; *Chick v. Ramsdale* (1835), 1 Curt., 34; *Woods v. W.* (1840), 2 Curt., 516. It is the duty of the minister and churchwardens to present incestuous persons to the ordinary for punishment; Canons 109, 113; and see *ante*, Chap. VI, p. 231, and pp. 310, 311; as to punishment for incest in Scotland, see *post*, Chaps. XV and XVIII.

⁶ 20 & 21 Vict., c. 85, s. 27, attempted sodomy was on a ground for a divorce *a mensa et thoro* in the Ecclesiastical Court; *Bromley v. B.* (1793), 2 Add., 158, n.; *Mogg v. M.* (1824), 2 Add., 292.

Sodomitical practices between husband and wife are sometimes alleged by a petitioning wife as cruelty ; but as naturally there is no corroborative evidence, the Court shrinks from believing such a charge on the wife's evidence alone.¹

¹ *N. v. N.* (1862), 3 Sw. & Tr., 234 ; *Geils v. G.* (1848), 6 N. of C., 97 ; and see Chap. IV, p. 173, and see *ante*, p. 332.

CHAPTER VIII

JUDICIAL SEPARATION AND PROTECTION ORDER

<p>1. Jurisdiction and Procedure, . . . 352</p> <p> (a) <i>The Court</i>, . . . 352</p> <p> (b) <i>Grounds for Judicial Separation</i>, . . . 352</p> <p> (c) <i>Procedure</i>, . . . 355</p> <p>2. Bars to Decree, . . . 356</p> <p> (a) <i>Adultery</i>, . . . 356</p>	<p> (b) <i>Cruelty</i>, . . . 356</p> <p> (c) <i>Desertion</i>, . . . 357</p> <p> (d) <i>Separation Deed and Estoppel</i>, . . . 357</p> <p> (e) <i>Delay</i>, . . . 358</p> <p> (f) <i>Connivance and Contumacious</i>, . . . 358</p> <p>3. Protection Order, . . . 359</p>
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SEC. 1.—JURISDICTION AND PROCEDURE

(a) *The Court*

THE old jurisdiction of the Ecclesiastical Courts to entertain matrimonial suits and give divorces *a mensa et thoro*¹ having been abolished by the Matrimonial Causes Act, 1857, it was transferred to the Court for Divorce and Matrimonial Causes.² This jurisdiction is now vested in the Probate Divorce and Admiralty Division; see Chap. VII, p. 240, as to the constitution of the Court; as to hearing at Assizes, see p. 355, n. 2.

(b) *Grounds for Judicial Separation*

The Matrimonial Causes Act, 1857, enacted—

“No decree shall hereafter be made for a divorce *a mensa et thoro*, but in all cases where a divorce *a mensa et thoro* might now be pronounced,

¹ For practice in Ecclesiastical Courts, see Clarke's *Praxis*, tits. cvii., cxiii., cxiv. The Clerk's Instructor in the Ecclesiastical Courts, chap. iv., pp. 386–406; Oughton, tit. cxiii., ccxiii.–ccxv.

² 20 & 21 Vict., c. 85; see *ante*, Chap. VII, p. 240.

the Court may pronounce a decree for judicial separation, which shall have the same force and the same consequences as a divorce *a mensa et thoro* now has ;”¹ and further, that “a sentence of judicial separation (which shall have the effect of a divorce *a mensa et thoro* under the existing law, and such other legal effect as herein mentioned) may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards ;”² and further, “if the respondent shall fail to comply with a decree for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced, although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights ;”³ and in such a suit for judicial separation the “Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have hitherto acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act ;”⁴ and further, “application for judicial separation on any one of the grounds aforesaid may be made by either husband or wife to the Court, according to the rules and regulations which shall be made under the authority of this Act ; and the Court to which petition is addressed on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the same should not be granted, may decree such judicial separation accordingly.”⁵

Such decree for judicial separation may be reversed on the application of a husband or wife, if such husband or wife shows that it was obtained in his or her absence, and that there was reasonable grounds for desertion.⁶ A judicial separation may be given on a petition for dissolution, at the prayer of the petitioner, although facts are proved

¹ 20 & 21 Vict., c. 85, s. 7.

² *Ib.*, s. 16.

³ Matrimonial Causes Act, 1884, 47 & 48 Vict., c. 68, s. 5 ; and see *Harding v. H.* (1886), 11 P. D., 111 ; *Bigwood v. B.* (1888), 13 P. D., 89.

⁴ 20 & 21 Vict., c. 85, s. 22.

⁵ *Ib.*, s. 17.

⁶ *Ib.*, s. 23, and rules 63–66 ; for procedure to obtain reversal, see Dixon on Divorce, 2nd ed., pp. 193–195. In order to obtain a reversal, it must be shown why the complainant was absent ; that, *e.g.*, he was not wilfully and contumaciously absent ; and must further show the decree was wrong on the merits ; *Phillips v. P.* (1866), L. R., 1 P. & M., 169.

sufficient to grant dissolution.¹ Also it is the practice when a suit for dissolution fails owing to the petitioner not bringing sufficient evidence to warrant a dissolution, to grant a judicial separation if the evidence is sufficient to entitle the petitioner to such a decree, *e.g.* where petitioning wife sets up cruelty and adultery, and only proves the latter.² But where the petition for dissolution fails, owing to a counter-charge being established against the petitioner amounting to an absolute or discretionary bar, it had been the practice to dismiss the petition and not to allow the petitioner to amend it into or to grant a decree of judicial separation;³ but in a recent divorce suit where the wife petitioned for dissolution, but her suit failed owing to desertion being established against her, Jeune, Pres., granted the wife a judicial separation.⁴

With a petition for judicial separation on account of the respondent wife's adultery may also be joined a prayer for damages against the adulterer.⁵ A decree of judicial separation may be subsequently turned into a decree for dissolution;⁶ and the mere fact that a husband or wife, although the facts of the case entitled the petitioner to a dissolution, elected only to obtain a decree for judicial separation, will not estop the petitioner subsequently obtaining a decree of dissolution. For instance,

¹ *Dent v. D.* (1865), 4 Sw. & Tr., 105; or a decree *nisi* altered to judicial separation; *Lewis v. L.* (1892), P., 212, 213.

² *Keech v. K.* (1868), L. R., 1 P. & M., 641; *Fitzgerald v. F.* (1869), L. R., 1 P. & M., 694; *Buckmaster v. B.* (1869), L. R., 1 P. & M., 713; *Lodge v. L.* (1890), 15 P. D., 159.

³ *Boreham v. B.* (1866), L. R., 1 P. & M., 77; *Lempriere v. L.* (1868), *ib.*, p. 569; *Mycock v. M.* (1870), L. R., 2 P. & M., 98.

⁴ *Duplany v. D.* (1892), P. 53, distinguishing *Olway v. O.* (1888), 13 P. D., 12 and 141, C. A.

⁵ 20 & 21 Vict., c. 85, s. 33; and see *Mason v. M.* (1883), 8 P. D., 21, C. A.; and Chap. VII, pp. 255-261.

⁶ As to the advisability of a spouse asking for judicial separation, see *ante*, Chap. VII, pp. 246, 247.

a husband has been guilty of adultery and cruelty, the wife obtained a judicial separation for his adultery; he subsequently again committed adultery, whereon the wife obtained a decree of dissolution on the ground of the old cruelty and the new adultery.¹

(c) *Procedure*

“Application for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the Court.”²

Generally the procedure in petitions for judicial separation is identical with that in petitions for dissolution of marriage, except that the decree is not by order *nisi*,³ but a decree absolute is given at once, which, however, may be reversed (see *ante*, p. 252); also, though the Court is to inquire into collusion, there is no power for the Queen’s Proctor or any other person to intervene.⁴ Also a suit for judicial separation (though not for dissolution) may be tried *in camera*; and where it is desirable for the sake of public decency that the investigation should take place in private, the public will be excluded.⁵

The same persons can petition for judicial separation as for dissolution, and the orders of the Court may be put in force and executed in the same way.⁶

Also witnesses are admissible, and evidence taken and weighed in the same manner as in a petition for dissolu-

¹ *Green v. G.* (1873), L. R., 3 P. & M., 121; followed *Mason v. M.* (1873), 8 P. D., 21, C. A.; and see *ante*, p. 246.

² 20 & 21 Vict., c. 85, s. 17. But it cannot be tried at Assizes, 21 & 22 Vict., c. 108, s. 19; and see pp. 248, 355.

³ See Chap. VII, pp. 247–251.

⁴ *Y. v. Y.* (1860), 1 Sw. & Tr., 598; see *ante*, p. 261.

⁵ *C. v. C.* (1869), L. R., 1 P. & M., 640; *A. v. A.* (1875), L. R., 3 P. & M., 230; and see p. 248.

⁶ See Chap. VII, pp. 250, 251–255; and *Ross v. R.* (1869), L. R., 1 P. & M., 629.

sion,¹ and the Court will draw a similar conclusion from evidence. As to the effect of the decree, see *post*, Chap. XIII, s. 5 ; as to decree against a clergyman, see *ib.*, s. 7, p. 430.

SEC. 2.—BARS TO DECREE²

(a) *Adultery*

If the petitioner has been guilty of adultery, neither he nor she can obtain a judicial separation on the ground of any matrimonial offence committed by the respondent, whether cruelty, however aggravated, or adultery, or both, for the adultery of the petitioner is an absolute bar.³ Recrimination of adultery or *compensatio criminum* was always a bar to a divorce in the Ecclesiastical Courts.⁴ But if the adultery of petitioner has been condoned, then such adultery is no bar to judicial separation for a subsequent matrimonial offence by the other party.⁵

As to adultery as a bar to dissolution of marriage, see Chap. VII, s. 4 (*b*), pp. 288–292 ; as to adultery as a bar to restitution of conjugal rights, see Chap. X, pp. 374, 375.

(b) *Cruelty*

It seems also since the Matrimonial Causes Act, 1857,

¹ See Chap. VII, pp. 305 and seq.

² For practice of Ecclesiastical Courts, see Clarke's Praxis, tit. cxv. ; Oughton, tit. cxxiv.

³ *Otway v. O.* (1888), 13 P. D., 141, C. A. ; following *Drummond v. D.* (1861), 30 L. J., P. & M., 177 ; and see *Grossi v. G.* (1873), L. R., 3 P. & M., 118.

⁴ See this explained by Lord Stowell, *Forster v. F.* (1790), 1 Hag. Con., 144 ; and see *Brisco v. B.* (1824), 2 Add., 259.

⁵ *Seller v. S.* (1859), 1 Sw. & Tr., 482, following *Anichini v. A.* (1839), 2 Cur., 210 ; and distinguishing *Hope v. H.* (1858), 1 Sw. & Tr., 94 ; and see *post*, Chap. X, p. 374, *compensatio criminum*, and overruling Lord Stowell's dicta in *Beeby v. B.* (1799), 1 Hag. Ec., 789, p. 797. In dissolution of marriage, adultery is a discretionary bar, and its condonation alone does not induce the Court to make a decree in the petitioner's favour ; see Chap. VII, s. 4, pp. 290–292.

a petitioner who has been guilty of cruelty, especially if such cruelty had led to the respondent's adultery, is barred from obtaining a decree of judicial separation.¹ As to cruelty as a bar to dissolution of marriage, see Chap. VII, s. 4 (c), pp. 292, 293. As to cruelty as a bar to restitution of conjugal rights, see Chap. X, p. 375.

(c) *Desertion*

It has been decided by Jeune, J., in a recent suit, that desertion proved against the petitioning wife was no bar to her obtaining judicial separation for the respondent's adultery.²

(d) *Separation Deed and Estoppel*

A separation deed is usually inconsistent with "desertion," and prevents a petitioner obtaining relief on that ground;³ and further, a separation deed usually contains a covenant not to sue, which amounts to estoppel;⁴ but in one case, where, after the execution of a separation deed, a husband sued for dissolution on the ground of the wife's adultery, which he failed to prove, but the respondent

¹ *Boreham v. B.* (1866), L. R., 1 P. & M., 77; *Lempriere v. L.* (1868), L. R., 1 P. & M., 569; but see *Duplany v. D.* (1892), P., 53. In the Ecclesiastical Court it had been several times held that the cruelty of the petitioner cannot be pleaded in bar to a divorce *a mensa et thoro* for the respondent's adultery; *Eldred v. E.* (1840), 2 Curt., 376; *Dillon v. D.* (1842), 3 Curt., 86, 92; *Cocksedge v. C.* (1844), 3 N. of C., 218.

² *Duplany v. D.* (1892), P., 53, not following the dictum of Lord Penzance in *Lempriere v. L.* (1868), L. R., 1 P. & M., 569; and *Boreham v. B.* (1866), L. R., 1 P. & M., 77. Jeune, J., based his decision on the doctrine that in Ecclesiastical Courts even malicious desertion by the petitioner was no bar to him or her obtaining a divorce *a mensa et thoro*; *Morgan v. M.* (1840), 2 Curt., 679; *Clowes v. C.* (1845), 4 N. of C., 1; and see Chap. VII, pp. 295-297.

³ See Chap. VII, s. 5 (d), pp. 339-341.

⁴ See Chap. VII, s. 3 (g), pp. 284, 285; and for definition of Estoppel, see Chap. III, p. 130.

ent proved several acts of cruelty against him previous to the separation, the respondent was granted a judicial separation ;¹ and in a similar case a respondent wife, after dismissal of husband's petition for divorce, was granted a judicial separation for desertion because the separation deed contained no covenant not to sue, and no provision as to condonation.²

If the petitioner has entered into a compromise of the suit, such compromise is binding upon both parties, except in case of fraud or a gross mistake in the agreement.³

(e) *Delay*

Delay in itself is no bar to a suit for judicial separation ; but coupled with other circumstances it may show that the suit is not instituted for the protection of the petitioner, but for some collateral purpose ; and if so, a decree will be refused.⁴

(f) *Connivance and Condonation.*

In the ecclesiastical courts connivance or condonation was a bar to a divorce *a mensa et thoro*, and therefore connivance or condonation (supposing the latter to be unaffected by "reviver") proved against the petitioner is a bar to a judicial separation. As to what constitutes connivance, see *ante*, pp. 268-272 ; for condonation, see pp. 272-282.

¹ *Brown v. B.* (1874), L. R., 3 P. & M., 202.

² *Moore v. M.* (1887), 12 P. D., 193.

³ *Hooper v. H.* (1863), 3 Sw. & Tr., 251.

⁴ *Matthews v. M.* (1859), 1 Sw. & Tr., 499 ; 3 Sw. & Tr., 161 ; distinguished *Cooke v. C.* (1863), 3 Sw. & Tr., 126, 246 ; and see the old Ecclesiastical cases, *Ferrers v. F.* (1791), 1 Hag. Con., 130 ; *Mortimer v. M.* (1820), 2 Hag. Con., 310 ; *Walker v. W.* (1813), 2 Phillim., 153 ; *Best v. B.* (1814), 2 Phillim., 161 ; *Richardson v. R.* (1827), 1 Hag. Ec., 6 ; and see *ante*, p. 293.

SEC. 3.—PROTECTION ORDER

A wife who is deserted by her husband can apply to the Probate and Divorce Division for a protection order.¹ There is a concurrent jurisdiction vested in a Court of Summary Jurisdiction to grant protection orders, as to which, see *post*, Chap. IX, pp. 361–364. For the grounds on which a protection order can be made, see *post*, Chap. IX, s. 2 (a), p. 361 ; and for its effect, see Chap. IX, s. 2 (b), p. 362, and Chap. XIII, s. 5. The application, when to the Probate and Divorce Division, may be made in writing, and heard in Chambers ; and must be supported by affidavits ;² and the husband need not be cited.³ If the order has been obtained wrongly, *i.e.*, fraudulently and by concealment of material facts, the husband may apply by motion to the Court for its reversal.⁴

A protection order made against a clergyman is not an offence under the Clergy Discipline Act, 1892.⁵

¹ 20 & 21 Vict., c. 85, s. 21 ; 21 & 22 Vict., c. 108, s. 6.

² Rules 124, 197.

³ *Ex parte Hall* (1858), 27 L. J., P. & M., 19 ; and see *ex parte Sewell* (1858), 28 L. J., P. & M., 8.

⁴ 20 & 21 Vict., c. 85, s. 21 ; 21 & 22 Vict., c. 108, s. 6 ; 27 & 28 Vict., c. 44, rule 125 ; and see *Mudge v. Adams* (1881), 6 P. D., 54 ; *Mahoney v. M'Carthy* (1892), P. 21. In both these cases the reversal of the protection order was obtained after the wife's death, and in order that the husband might obtain possession of her goods by his marital right, as against her executor.

⁵ 55 & 56 Vict., c. 32, s. 1 ; and see Chap. XIII, s. 8.

CHAPTER IX

MAGISTERIAL SEPARATION

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SEC. 1.—JURISDICTION OF POLICE COURTS

BESIDES the concurrent jurisdiction vested in the Probate and Divorce Division, a minor jurisdiction was conferred by the Matrimonial Causes Act, 1857, on a Petty Sessional or Police Court, *i.e.*, on two or more Justices in Petty Sessions, or a Metropolitan and Stipendiary Magistrate sitting alone, to give limited relief to a wife who had been *deserted* by giving her what was called a protection order.¹ The jurisdiction of the Police Court is not exclusive, for an application for a protection order may also be made to the Probate and Divorce Division.² By the policy of the Legislature this jurisdic-

¹ 20 & 21 Vict., c. 85, s. 21; see *ante*, Chap. VIII, s. 3, p. 358; as to ground for and effect of protection order, see *post*, pp. 361, 362, and Chap. XIII, s. 5.

² 20 & 21 Vict., c. 85, s. 21, and 21 & 22 Vict., c. 108, s. 6; and see *ante*, Chap. VIII, s. 3, p. 358.

tion was increased in 1878 by the Matrimonial Causes Act, 1878, extending it to cases where the husband had been guilty of an *aggravated assault on his wife*, when the Court has power to make a separation order; and further, in certain cases, to make an order by way of alimony and custody of children.¹ And in 1886, by the Married Women (Maintenance in Case of Desertion) Act, 1886, a further jurisdiction was conferred on a magistrate in case of desertion of a wife by her husband, to make an order in favour of such woman by way of alimony; ² such order being much more ample than the protection order, which, previous to that Act, was the only relief he could have given in case of a desertion.

In all these Acts it is provided that the wife shall be the complainant, and no remedy under them is provided in favour of a husband who has been deserted or assaulted by his wife.

The application must be to the Police Court of the district in which the complaining wife resides.³

A separation (but not a protection or maintenance) order made against a clergyman is an offence under the Clergy Discipline Act, 1892; see *post*, Chap. XIII, s. 8.

SEC. 2.—PROTECTION ORDER ⁴

(a) *Grounds for Order*

The wife can apply in case she is *deserted* by her husband for an order to protect her subsequently acquired earnings and property; and the Court, if satisfied that such desertion was *without reasonable cause*, and that the

¹ 41 Vict., c. 19, s. 4. For grounds and effect of separation order, see *post*, pp. 364–368.

² 49 & 50 Vict., c. 52.

³ *R. v. J. J. of Plymouth* (1880), 44 J. P., 168.

⁴ See *ante*, Chap. VIII, s. 2, p. 358; and *post*, Chap. XIII, s. 5.

wife is maintaining herself by her own industry and property, may make the order.¹

Desertion.—The grounds for the order must be “desertion” in the proper sense of the word, not mere separation by mutual consent, or a going away by the husband to follow his business.² Nay, further, the desertion contemplated by this section as the ground for a protection order, must go beyond the desertion as contemplated in the case of a petition for dissolution of marriage or judicial separation; for in this section

“Desertion means, not only that the husband has absented himself, but has left the wife unprovided for; and such desertion must continue at the time of making the order, and a *bonâ fide* offer of the husband to return and provide for his wife would take away her right to have such an order made.”³

(b) *Effect of the Order*⁴

The protection order does not give the wife the right to any payment by way of alimony from her husband or release her from cohabitation; it merely regards property, and it thus *gives her her own*, and the right to hold such property, and to sue and be sued like a *feme sole*.

In order to appreciate the effect of a protection order under the Matrimonial Causes Act, 1857, it must be remembered what was the state of the law previous to the Married Women's Property Acts with regard to the property of married women who had no settlements; see *ante*, Chap. IV, pp. 184–188. Since these Acts, which give a woman control over her own property, and the right to sue and be sued, and contract with regard to such separate

¹ 20 & 21 Vict., c. 85, s. 21.

² *Ex parte Aldridge* (1858), 1 Sw. & Tr., 88.

³ *Cargill v. C.*, 1 Sw. & Tr., 235, per Lord Penzance, followed and approved *Mahoney v. M'Carthy* (1892), P., 21; and see *ante*, Chap. VII, s. 5 (d), pp. 337–349; and *post*, s. 4 (a), p. 368, as to what is “desertion.”

⁴ And see Chap. XIII, s. 5.

property (see *ante*, pp. 188 and seq.), a protection order seems more or less useless and unnecessary. But now for the same ground of desertion, the wife has besides the protection order, the more ample remedy of a maintenance order; see *post*, pp. 368–370.

The Court was empowered to make

“An order protecting her (lawful) earnings and property acquired since the commencement of such desertion from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*.”

The order is to be entered with the registrar of the County Court; and if, after notice of the order, the husband, or any creditor of the husband, seizes and holds any property of the wife, he will be liable to restore the specific property and double its value; and during the continuance of the protection order the wife is to be in the same position as to property and contracts, suing and being sued, as if she had obtained a decree of judicial separation.¹

The order is to state the time when the desertion commenced.²

The protection order bars the wife's right to pledge the husband's credit for necessities.³ So to a poor wife a protection order was but little, if any, advantage, and now seems absolutely useless. For it did not relieve her from cohabitation, it did not compel the husband to pay her any alimony, and it did not permit her to pledge his credit; it merely gives her her own property (if any), which

¹ 20 & 21 Vict., c. 85, s. 21; and 21 & 22 Vict., c. 108, s. 7.

² 21 & 22 Vict., c. 108, s. 9; the order is retrospective as to goods acquired since the desertion, but previous to the order. *Goods of Ann Elliott* (1871), L. R., 2 P. & M., 274.

³ *Tempany v. Hakewill* (1858), 1 F. & F., 438; and see *ante*, Chap. IV, pp. 178–182, as to the wife's property and right to pledge the husband's credit for necessities.

is now effected by the Married Women's Property Act, 1882.

A protection order does not bar or preclude the wife from petitioning the High Court for a dissolution of marriage, or for a judicial separation, or from obtaining alimony in such suit.¹

(c) *Cessation of Order*

Any husband or any creditor claiming under him may apply to the Court that the order be discharged;² and if the order was obtained by the applicant wife having concealed material facts from the Court which granted the order, the order will be discharged.³

But the reversal of the order is not to affect any valid interim contracts or dealings with the wife's property.⁴ Where, however, no one's rights can be affected,—that is to say, the only persons interested being the wife's executors and legatees,—the husband can apply even after the wife's death to have a protection order unjustly obtained discharged, and in such action obtain revocation of probate, and so obtain by his marital right, when available, and in those cases where the wife is not otherwise entitled to make a will, the whole of her personal property.⁵

SEC. 3.—SEPARATION ORDER

(a) *Grounds for Order*

In 1878 the Legislature conferred further jurisdiction on a Police Court to give a separation order to a wife who

¹ *Hakewill v. H.* (1860), 30 L. J., P. & M., 254; and see *Gillet v. G.* (1889), 14 P. D., 158.

² 20 & 21 Vict., c. 85, s. 21; 27 & 28 Vict., c. 44.

³ *Mahoney v. M'Carthy* (1892), P., 21.

⁴ 21 & 22 Vict., c. 108, ss. 8-10.

⁵ *Mudge v. Adams* (1881), 6 P. D., 54; *Mahoney v. M'Carthy*, *ubi sup.*

had been assaulted by her husband, and to order against the husband payment of alimony to the wife, and to give over to the wife the custody of the children.

The Matrimonial Causes Act, 1878, provided—

“If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute 24 & 25 Vict., c. 100, s. 43, upon his wife, the Court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with the husband;”

such order is subject to appeal to the Probate Division of the High Court.¹

Aggravated Assault.—An aggravated assault is defined as an assault on a female of such an aggravated nature that it cannot in the opinion of the Justices be sufficiently punished as a common assault.²

The Justices, on committing the husband for an aggravated assault, can grant a separation order without imposing a fine or imprisonment.³

(b) Bar to Order

It was provided by the Act—

“That no order for payment of money by the husband, or for custody of the children of the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned.”⁴

As to what is condonation of adultery, see *ante*, Chap. VII, pp. 272–282. It appears that this proviso does not bar

¹ 41 Vict., c. 19, s. 4; and as to appealing, see *Hetherington v. H.* (1887), 12 P. D., 112; *Powell v. P.* (1889), 14 P. D., 177; *Lewin v. L.* (1891), P., 254; *Grove v. G.* (1878), 14 Cox C. C., 200.

² 24 & 25 Vict., c. 100, s. 43; and see *Holden v. King* (1876), 46 L. J. Ex., 75.

³ *Woods v. W.* (1884), 10 P. D., 172; *Powell v. P.* (1889), 14 P. D., 177.

⁴ 41 Vict., c. 19, s. 4.

an adulterous wife who had been assaulted by her husband getting an order that she should not be bound to cohabit to the effect above defined ; as to whether adultery even condoned would bar a wife from obtaining a dissolution of marriage or judicial separation, see *ante*, Chaps. VII and VIII, pp. 288-292, 356. It appears that no other form of matrimonial misconduct except adultery is a bar to a separation order. Subsequent adultery is a ground for variation ; see (*d*), p. 367.

(c) *Effect of Order*

The Court can "order that the wife shall be no longer bound to cohabit with the husband ; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty ; and such order may further provide—

1. That the husband shall pay to his wife such weekly sum as the Court or magistrate may consider to be in accordance with his means, and with any means which the wife may have for her support ; and the payment of any sum of money so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation.

2. That the legal custody of any children of the marriage under the age of ten years shall, in the discretion of the Court or magistrate, be given to the husband."¹

But the Justices are not obliged on convicting and giving the order to hear the husband's evidence as to his means.²

The amount of the weekly sum which the Court may order the husband to pay is not limited as it is under a maintenance order ; as to which, see pp. 369, 370.

When it is provided that the payment of the money can be enforced as under an affiliation order, it thereby results that it can be enforced by distress, and in default of distress by imprisonment, and in that way only.³

¹ 41 Vict., c. 19, s. 5.

² *Powell v. P.* (1889), 14 P. D., 177.

³ See the Bastardy Acts, 4 & 5 Will. IV, c. 76, ss. 57, 71 ; 7 & 8 Vict., c. 101, ss. 4-8 ; 8 & 9 Vict., c. 10, ss. 3-9 ; 35 & 36 Vict., c. 65 ; 36 Vict., c. 9 ; 44 & 45 Vict., c. 24, s. 6 ; and see *post*, Chap. XII, s. 3, p. 415.

If the husband goes out of the jurisdiction and leaves no tangible goods that are physically seizable, the wife is without remedy, however large be the husband's property in stocks and shares, etc., or by way of interest under a settlement.¹

But a magisterial separation in her favour does not preclude or stop the wife from applying for a petition to the Probate and Divorce Division of the High Court for a dissolution of marriage or a judicial separation, in which, of course, she will obtain alimony in the usual way; and this will be indeed her only effectual course if the husband absconds.²

(d) Variation and Cessation of Order

"The Court or magistrate by whom any such order for payment of money shall be made, shall have power from time to time to vary the same on the application of either the husband or the wife, upon proof that the means of the husband or wife have been altered in amount since the original order or any subsequent order varying it shall have been made;" . . . and "any order for the payment of money or for the custody of children may be discharged by the Court or magistrate by whom such order was made upon the proof that the wife has since the making thereof been guilty of adultery."³

The appeal from the original order or from a refusal to discharge or vary is to the Probate and Divorce Division; but the application to discharge must, in the first instance, be made to the Court which originally convicted.⁴ On such application the Court should receive evidence as to the paternity of a child born more than nine months after the separation order.⁴

Reconciliation and resumption of cohabitation without any order put an end to the separation order, and its

¹ *Gillet v. G.* (1889), 14 P. D., 158; and see cases under the Bastardy Acts; and *post*, Chap. XII, s. 3, p. 415.

² See *Gillet v. G.*, *ubi sup.*; and see *ante*, p. 364.

³ 41 Vict., c. 19, s. 4; and see *R. v. Huggins* (1891), W. N., 88.

⁴ *Hetherington v. H.* (1887), 12 P. D., 112.

validity ceases, and the payment of alimony due under it cannot be enforced even if they again separate.¹

SEC. 4.—MAINTENANCE ORDER

(a) *Grounds and Application for Order*

The Married Women (Maintenance in Case of Desertion) Act, 1886, empowered—

“Any married woman who shall have been *deserted by her husband* to summon her husband before any two Justices in Petty Sessions, or any Stipendiary Magistrate; and thereupon such Justices or Magistrate, if satisfied that the husband, being able wholly or in part to maintain his wife and family has wilfully refused and neglected to do so, may” make a maintenance order.²

The mere fact that husband and wife are living separate will not give the wife a right to maintenance; there must be desertion.

That is to say, the parties must have been living together when the desertion took place. If the wife left the husband, or if they separated by mutual consent or under some separation agreement or deed, then there is no “desertion.” Nor, if the husband neglects or refuses to pay what he contracted to pay by a separation deed, does that constitute desertion, although in that case the wife can usually call on him to resume cohabitation; and if he refuse, enforce it. Still even in this last case the refusal is not “desertion.”³

This Act gives a more ample remedy to a *deserted* wife as against her husband than a protection order (see *ante*,

¹ *Haddon v. H.* (1887), 18 Q. B. D., 778.

² 49 & 50 Vict., c. 52; the procedure is assimilated to that in a summons for assault.

³ *Pape v. P.* (1887), 20 Q. B. D., 76; *R. v. Leresche* (1891), 2 Q. B., 418; and as to what is desertion, see further, *ante*, s. 2 (a) p. 362, and Chap. VII, pp. 337–349; but the desertion is a question of fact for the Justices; *R. v. Birwistle* (1889), 58 L. J., M. C., 158.

pp. 358, 359, 361–364), which previously was her only remedy. For although, on a husband deserting his wife, the guardians could sue him on her becoming chargeable to the parish (see *ante*, p. 181), yet this did not allow the wife to sue. And if, on the wife having become chargeable, such an order has been made, and the wife subsequently leaves the Union, she may then obtain a maintenance order against her husband.¹

This Act is retrospective, being intended to cure an existing evil and to afford married women a remedy for desertion, whether such desertion took place before the passing of the Act or not.²

(b) *Bar to Maintenance Order*

“Provided always that no order for payment of any such sum by the husband shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned.”³

As to what is condonation of adultery, see *ante*, pp. 272–282; and see also pp. 290–292, 356, 365, 366, how far adultery or condoned adultery is a bar to a dissolution of marriage, a judicial separation, or a separation order. Subsequent adultery is a ground for variation; see p. 370.

(c) *Effect of Order*

The maintenance order that may be made by the Court is—

“That the husband shall pay to the wife such weekly sum, not exceeding two pounds, as the Justices or Magistrate may consider to be in accordance with his means and with any means the wife may have for her support and the support of her family; and the payment of any sum so ordered shall be enforceable and enforced in the same manner as the payment of money is enforced under an order of affiliation.”⁴

¹ *Kershaw and K.* (1887), 51 J. P., 646.

² *R. v. Birwistle* (1889), 58 L. J., M. C., 158.

³ 49 & 50 Vict., c. 52, s. 1 (2).

⁴ *Ib.*, s. 1 (1).

The power of ordering maintenance and enforcing it is word for word identical with that of ordering money under a separation order, see *ante*, pp. 366, 367 ; except that a maintenance order is limited in amount to two pounds a week, and there is no power of giving custody of children to the wife.

It would also seem by analogy to the protection and separation orders that the maintenance order does not preclude the wife petitioning the High Court ; see *ante*, pp. 364, 367.

It is not declared by the Act that a maintenance order is equivalent to a judicial separation, or that it relieves her from cohabitation ; so it would seem to follow that a husband could at any moment terminate the desertion, and require to be taken back into cohabitation ; and if the wife refuses she will be in default.

(d) *Variation and Cessation of Order.*

“The said Justices or Magistrate by whom any such order for payment shall be made, or other Justices or Magistrate sitting in their or his stead, shall have power from time to time to vary the same, on the application of either the husband or wife, upon proof that the means of the husband or the wife have been altered in amount since the original order, or any subsequent order varying the same shall have been made :” and “any order for payment of any such sum may be discharged by the Justices or Magistrate by whom such order was made, or other Justices or Magistrate sitting in their or his stead, upon proof that the wife, since the making thereof, has been guilty of adultery.”¹

This provision as to variation or discharge of a maintenance order is similar to that as to the variation or discharge of a separation order (see *ante*, pp. 367, 368), and it may be presumed that a maintenance order would also be terminated by resumption of cohabitation (see *ante*, pp. 367, 368).

¹ 49 & 50 Vict., c. 52, s. 1 (1) (2), and see s. 2.

CHAPTER X

RESTITUTION OF CONJUGAL RIGHTS AND JACTITATION

<p>1. Restitution of Conjugal Rights, 371</p> <p>(a) <i>Cause of Action</i>, 371</p> <p>(b) <i>Defences</i>, 374</p> <p style="padding-left: 20px;"><i>Denial of Marriage</i>, 374</p> <p style="padding-left: 20px;"><i>Adultery</i>, 374</p> <p style="padding-left: 20px;"><i>Cruelty</i>, 375</p>	<p style="padding-left: 40px;"><i>Insincerity</i>, 375</p> <p style="padding-left: 40px;"><i>Separation Deed</i>, 376</p> <p style="padding-left: 40px;"><i>Offer to return to Cohabitation</i>, 376</p> <p style="padding-left: 20px;">(c) <i>Sentence</i>, 376</p> <p style="padding-left: 20px;">(d) <i>Effect of Suit</i>, 378</p> <p>2. Jactitation of Marriage, 378</p>
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SEC. 1.—RESTITUTION OF CONJUGAL RIGHTS

(a) *Cause of Action*

RESTITUTION of conjugal rights is the proper Ecclesiastical remedy for desertion, for desertion in the Ecclesiastical Courts was not punishable in any other way ; see Chap. VII, pp. 295, 337, and Chap. VIII, p. 357.

“In this suit the marriage is pleaded by the party proceeding, and it is further alleged that the party proceeded against has withdrawn from cohabitation, and the prayer is that the defendant, whether husband or wife, shall be compelled to return to cohabitation. . . . This process has in a very few instances been resorted to for purposes resembling those sought to be attained by the Scotch proceeding of declarator of marriage, namely, with the view of trying the validity of a marriage respecting the legality of which some doubt may exist, and where there may be a chance that the witnesses to establish the same may, if the marriage be contested at a future time, be dead or not forthcoming.”¹

Previous to 1891 it was considered to be the law that a deserted husband had a concurrent right of redress by

¹ Ecclesiastical Courts Commission Report, 1831 (70), p. 43 ; 3 Bl. Com., 94 ; see Clerk's Instructor in the Ecclesiastical Courts, chap. iv., pp. 322-330.

act of the party in seizing his wife ; but in that year, where a husband whose conduct was otherwise blameless seized his wife when she refused to cohabit, the Court of Appeal released her by *habeas corpus*.¹

The suit can only be instituted when the respondent has withdrawn from cohabitation in the same house. A suit cannot be instituted on the ground that the petitioner, though allowed by the respondent to reside in the same house with him, was denied access to his person and bed.² For "the duty of matrimonial intercourse cannot be compelled by the Court, though matrimonial cohabitation may be."³

On the other hand, the fact that a respondent has supplied the petitioner with a suitable house and establishment and a sufficient income, is no answer to a petition for restitution if the respondent refuses to live under the same roof with the petitioner.⁴

In this case Captain Weldon declined to cohabit with Mrs. Weldon. He had taken a furnished house at Acton, engaged two servants, offered to pay the rent as long as it was occupied, and continued an allowance of £500 a year, paid monthly. He also offered, if Mrs. Weldon preferred to live in any other neighbourhood, to endeavour to make arrangements to meet her wishes. Nevertheless, Mrs. Weldon was held entitled to have a decree for restitution enforced by attachment against Captain Weldon.⁴

It is not necessary to aver the age of the parties.⁵

¹ *R. v. Jackson* (1891), 1 Q. B., 671, C. A.; and see Dr. Lushington's dicta in *Lockwood v. L.* (1839), 2 Curt., 281, pp. 301, 302; and see *ante*, Chap. IV, pp. 166, 167, 177, 178. Neither can a husband, against whom an order for restitution has been made, force himself into his father-in-law's house; *Harding v. H.* (1886), 11 P. D., 111.

² *Orme v. O.* (1824), 2 Add., 382.

³ See *Forster v. F.* (1790), 1 Hag. Con., 144, p. 154; and see *ante*, p. 171.

⁴ *Weldon v. W.* (1883), 9 P. D., 52; and see *post*, p. 377.

⁵ *Pool v. P.* (1813), 2 Phillim., 119.

Also in a suit for divorce it was the practice of the Ecclesiastical Courts, if the suit failed for want of proof, to decree restitution;¹ if the suit failed by reason of recrimination against the petitioner, the respondent was simply dismissed, and restitution not ordered.²

But under the present practice the respondent to a petition for dissolution cannot with her answer pray for restitution of conjugal rights.³

By the Matrimonial Causes Act, 1857, the jurisdiction of the Ecclesiastical Court was abolished and transferred to and vested in the Court for Divorce and Matrimonial Causes, and now to the Probate and Divorce Division of the High Court,⁴ where relief is to be given on the same rules and principles on which the Ecclesiastical Courts acted.⁵ Application for restitution of conjugal right is to be by petition to the Court, by either husband or wife.⁶

The petitioner must, previous to the institution of the suit, make a written demand on the respondent to return to cohabitation;⁷ this must not be a lawyer's letter, but written by the party personally in a friendly spirit.⁸

Also at any time during the suit, the respondent

¹ *Evans v. E.* (1790), 1 Hag. Con., 35, p. 129; *Oliver v. O.* (1801), 1 Hag. Con., 361; *D'Aguilar v. D'A.* (1794), 1 Hag. Ec., sup. 773, p. 784; and see *Westmeath v. W.* (1827), 2 Hag. Ec., sup. 1, p. 62; but see *Scott v. Jones* (1842), 2 N. of C., 36; a nullity for impotence suit, which failed.

² *Denniss v. D.* (1808), 3 Hag. Ecc., 348, n., 353, n.; *Forster v. F.* (1790), 1 Hag. Con., 144; and see *Hope v. H.* (1858), 1 Sw. & Tr., 94, cited *post*, p. 374.

³ *Drysdale v. D.* (1867), L. R., 1 P. & M. 365.

⁴ 20 & 21 Vict., c. 85, ss. 2, 6; see *ante*, Chap. VII, pp. 238-242, for constitution of the Court. A petition for restitution cannot be heard at Assizes, 21 & 22 Vict., c. 108, s. 19; repealing partly, 20 & 21 Vict., c. 85, ss. 17, 18; and see *ante*, pp. 348, 355.

⁵ 20 & 21 Vict., c. 85, s. 22.

⁶ S. 17; and see *ante*, Chap. VII, pp. 247, 248.

⁷ Rule 175.

⁸ *Fitch v. F.* (1888), 14 P. D., 26, C. A.; *Smith v. S.* (1890), 15 P. D., 11, 47, C. A.; and see *ex parte Sheehy* (1876), 1 P. D., 423.

on offering to return to cohabitation may have it stayed.¹

In order to give jurisdiction to the Court, the husband must be either domiciled, or at least resident for some considerable time in England.²

(b) *Defences*

Denial of Marriage, Cruelty, or Adultery.—In defence the marriage may be denied, or the adultery or the cruelty of the petitioner pleaded in bar.³

Adultery of the petitioner is a bar to a suit for restitution,⁴ even although the respondent also may have been guilty of adultery.⁵ In this case the petitioner's adultery had not been condoned, and elsewhere *dicta* are to be found, that condoned adultery by a petitioner is not a bar to a suit for restitution.⁶

That the respondent has previously set up the same facts to prove the petitioner's adultery in a suit for divorce, and failed to prove them, is a bar by way of

¹ Rule 176; *Crothers v. C.* (1868), L. R., 1 P. & M., 568; but after "failure to comply" with the decree, an offer to cohabit is too late; *Harding v. H.* (1886), 11 P. D., 111.

² *Yelverton v. Y.* (1859), 1 Sw. & Tr., 574; *Firebrace v. F.* (1878), 4 P. D., 63; *Chichester v. C.* (1885), 10 P. D., 186.

³ Ecclesiastical Commission Report, 1832, p. 43; Clarke's Praxis, tit. ccxvi.; Oughton, tit. ccxxvi.; and see *Grant v. G.* (1754), 1 Lee, 592; *Conran v. Lowe* (1754), 1 Lee, 630, where in each case a Fleet marriage was set up; and see *Swift v. Kelly* (1832), 4 Hag. Ec., 139.

⁴ *Owen v. O.* (1831), 4 Hag. Ec., 261; but actual adultery, not mere impropriety, must be set up; *Burroughs v. B.* (1861), 2 Sw. & Tr., 303.

⁵ *Hope v. H.* (1858), 1 Sw. & Tr., 94; Sir Cresswell Cresswell's judgment, overruling and disregarding the Canon Law, and Oughton; but see a contrary decision in Ireland, *Seaver v. S.* (1846), 2 Sw. & Tr., 665, where in a case of "compensation" it was held that an adulterous petitioner could obtain restitution against an adulterous respondent.

⁶ *Anichini v. A.* (1839), 2 Curt., 210, discussed in *Hope v. H.*, *ubi sup.*; and see *Bramwell v. B.* (1831), 3 Hag. Ec., 618; *Seller v. S.* (1859), 1 Sw. & Tr., 482.

estoppel to setting up again the same charges, by way of defence, to an action for restitution.¹

In such case where the respondent sets up the petitioner's adultery, the respondent can ask for and if proved obtain a judicial separation.²

As to *cruelty*, nothing could be offered in bar to a suit for restitution except what would be sufficient to entitle the respondent to a divorce in case she had sued setting up cruelty.³

Still in one case the respondent wife was allowed to plead her ill-health, and that the petitioning husband lived in Ireland ;⁴ in another, desertion by the petitioner ;⁵ in another, antenuptial incontinency by the petitioner was suggested as a bar.⁶

But in another case the respondent husband was not allowed to set up his wife's insanity and a morbid hatred towards him in bar of her suit, for the insanity of the wife is no ground for the husband turning her out of doors.⁷

Insincerity.—The insincerity of the petitioner, and the fact that the motive of the suit is merely to obtain money, is no defence, and whatever the petitioner's motives may be, the Court is bound to pronounce for restitution.⁸ In fact, Lord Hannen, Pres., said—

¹ *Sopwith v. S.* (1861), 2 Sw. & Tr., 160, explaining *Moore v. M.* (1843), 3 Moore P. C., 84 ; and see *Carnegie v. C.* (1886), 17 L. R. Ir., 430, C. A. ; and *ante*, Chap. VII, pp. 285, 286, as to Estoppel.

² *Blackborne v. B.* (1868), L. R., 1 P. & M., 563.

³ *Holmes v. H.* (1755), 2 Lee, 116 ; *Scott v. S.* (1865), 4 Sw. & Tr., 113 ; but see *Carnegie v. C.* (1886), 17 L. R. Ir., 430, C. A. ; as what is cruelty and as what is reasonable cause for desertion, see Chap. VII, pp. 323-337, 346-349 ; as to how far the dismissal of a previous suit by the respondent, grounded on cruelty, amounts to an estoppel against raising it again, see *Carnegie v. C.*, *ubi sup.* ; and see *ante*, Chap. VII, pp. 285, 286, as to Estoppel.

⁴ *Molony v. M.* (1824), 2 Add., 249.

⁵ *Scott v. S.*, *ubi sup.*

⁶ *Perrin v. P.* (1822), 1 Add., 1, p. 4.

⁷ *Hayward v. H.* (1858), 1 Sw. & Tr., 81 ; and see *ante*, as to insanity, pp. 328, 336, 337. ⁸ *Simmons v. S.* (1847), 5 N. of C., 324, p. 329.

"I must further observe that so far are suits for restitution of conjugal rights from being in truth and in fact what theoretically they purport to be, proceedings for the purpose of insisting on the fulfilment of the obligation of married people to live together, I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand."¹

Separation Deed and Agreement not to sue.—A separation deed, whether or not entered into as the compromise of existing litigation, or as a private arrangement between the parties, bars the right to sue for restitution.²

Offer to return to Cohabitation.—The respondent, by offering at any time to return to cohabitation, may have the suit stayed;³ but not if the offer is not *bonâ fide* or "after failure to comply" with decree when desertion is complete.⁴

(c) Sentence

The sentence of the Court is that the respondent husband shall, within a limited time fixed by the Court, take the wife home and treat her with conjugal affection, and *mutatis mutandis* where the husband sues;⁵ if the husband is respondent, after sentence it is his duty to take the first step by asking her to return to him.⁶ If the respondent neglects or refuses to obey the sentence, he or she would have been attached. Therefore, if either

¹ *Marshall v. M.* (1879), 5 P. D., 19, p. 23.

² *Stanes v. S.* (1878), 3 P. D., 42; *Marshall v. M.* (1879), 5 P. D., 19; *Clark v. C.* (1885), 10 P. D., 188, C. A. However, in *Tress v. T.* (1887), 12 P. D., 128, under special circumstances the petitioning wife was granted a decree for restitution notwithstanding she had entered into a separation deed covenanting not to take proceedings to compel cohabitation; and see *ante*, pp. 200, 228, 271, 284, 339, 357, as to separation deeds.

³ Rule 176; and see *Crothers v. C.* (1868), L. R., 1 P. & M., 568.

⁴ 47 & 48 Vict., c. 68, s. 5; *Harding v. H.* (1886), 11 P. D., 111; and see *ante*, pp. 344–346.

⁵ *Orme v. O.* (1824), 2 Add., 382. The Clerk's Instructor in the Ecclesiastical Courts, p. 327; *Dalrymple v. D.* (1811), 2 Hag. Con., 54, p. 137; and see the recent case of *Hawtrey v. H.*, reported in the daily papers for July 6, 1892.

⁶ *Alexander v. A.* (1861), 2 Sw. & Tr., 385.

spouse refused, without just cause, to live with the other, the complaining deserted spouse could either compel the other to live with him, or have her imprisoned until she consents to cohabit. The Court had no power of releasing the respondent except upon obedience. The attachment was not in the discretion of the Court, but *ex debito justitiæ* to enforce the legal rights of the husband.¹ In one case a husband was imprisoned for three years in the county gaol of Salop, and then only released because it appeared he had a good defence (the petitioning wife's elopement and adultery, which he had neglected to plead);² in another, a wife was imprisoned in Norwich gaol for a year, and her application to be released refused.³

But in 1884 the Matrimonial Causes Act, 1884, enacted that from and after the passing of the Act a decree for restitution of conjugal rights shall not be enforced by attachment;⁴ but in case of non-compliance the respondent may be ordered to pay money in the nature of alimony or maintenance to the petitioner (see *post*, Chap. XI, s. 2); and also such disobedience amounts to "desertion" (see Chaps. VII, p. 344, and VIII, p. 353); and an offer by respondent to cohabit after time for compliance had expired is unavailing, as desertion is complete.⁵ But the Act does not apply to Ireland.⁶ So a decree for restitution of conjugal rights may there still be enforced by attachment; see Chap. XIX, s. 2 (a). The Matrimonial Causes Act, 1884, also empowers the Court in case of non-compliance by respondent to make orders as to custody of children; see *post*, pp. 393, 404.

¹ *Barlee v. B.* (1822), 1 Add. Ec., 301; *Lakin v. L.* (1854), 1 Spinks, Ecc. & Add., 274; *Scott v. S.* (1865), 4 Sw. & Tr., 113; *Weldon v. W.* (1883), 9 P. D., 52.

² *Lakin v. L.*, *ubi sup.*

³ *Barlee v. B.*, *ubi sup.*

⁴ 47 & 48 Vict., c. 68, the Act is retrospective; *Weldon v. W.* (1885), 10 P. D., 72.

⁵ *Harding v. H.* (1886), 11 P. D., 111. ⁶ 47 & 48 Vict., c. 68, s. 7.

(d) Effect of Suit

The institution of a suit for restitution usually shows that there is no fear in the petitioner of cruelty by the respondent, and it usually amounts to condonation; but like other condonation, it is subject to revival by subsequent offences.¹ A decree for restitution made against a clergyman is not an offence under the Clergy Discipline Act, 1892; see *post*, Chap. XIII, s. 8.

SEC. 2.—JACTITATION OF MARRIAGE

This suit is analogous to a libel action; but brought in the Ecclesiastical Court the remedy being not in damages, but by way of injunction. The cause of action, *i.e.*, the quasi libel complained of, is that one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. Unless the respondent sets up and proves a marriage, and there are no acts by the petitioner amounting to an estoppel, the respondent will be enjoined perpetual silence on that head.² Suits for jactitation were very familiar in the Ecclesiastical Courts till 1770, when they were brought into disrepute by the celebrated trial of the Duchess of Kingston for bigamy in the House of Lords,³ and the action has now fallen into disuse;⁴

¹ *Neeld v. N.* (1831), 4 Hag. Ec., 263, p. 268; *Evans v. E.* (1843), 2 N. of C., 470, p. 473; *Wilson v. W.* (1849), 6 Moore P. C., 484, where it was held not to be condonation; and see *ante*, Chap. VII, pp. 276, 277.

² 3 Bl. Com., 93; Oughton, tit. 194-197; Clarke's Praxis, tit. cviii.-cxi.; Shelford on Marriage and Divorce, pp. 582-586. The Clerk's Instructor in the Ecclesiastical Courts, chap. iv., pp. 369-375.

³ See *Walton v. Rider* (1752), 1 Lee, 16, n.; but there are two later cases in which Jewish marriages were, according to the evidence of their own rites, held invalid in such suits; *Lindo v. Belisario* (1795), 1 Hag. Con., 216; *Goldsmid v. Bromer* (1798), 1 Hag. Con., 324; and see an Irish case, *Bodkin v. Case* (1835), Milw., 355, 356; and see *Westcombe v. Dods* (1752), 1 Lee, 59.

⁴ But see the recent case of *Thompson v. Rourke* (1892), P., 254, C.

although in 1862 an attempt was made to revive such a suit by petitioner complaining of a boasted marriage with his mother. But there being no precedent for the institution of such a suit by any one except the parties to the boasted marriage, the suit was dismissed.¹

The institution of such suit was another way of trying the validity of the marriage besides the suit for a declaration of nullity, see *ante*, Chap. VI, p. 227; but the decree of silence given thereon was not so conclusive as a decree of nullity.² Suits for jactitation are now, by the effect of Matrimonial Causes Act, 1857, and the subsequent Acts, transferred to the Probate and Divorce Division, where they must be tried on the same principles as formerly in the Ecclesiastical Courts.³

There are three defences, first, a denial of the alleged boasting; secondly, an admission of the boasting, but that it is true in that a marriage has actually passed, when the proceedings assume the shape of a suit for nullity and restitution of conjugal rights, or an inquiry into the fact and validity of the alleged marriage, whereon the Court would either pronounce nullity and enjoin silence, or on proof of the marriage order the accuser to return to matrimonial cohabitation; a third defence is by way of estoppel, that although there is no marriage the complainant has fully authorised the boasting by publicly, officially, and continually treating the respondent as his acknowledged wife.⁴

There is no power in a suit for jactitation to make an order for alimony or custody of children.⁵

A.; and see a report of a proceeding in this suit in the Times for 1892, July 14, p. 14. Also on the trial of Richard Dames for bigamy, at Devon Assizes, it was stated that the prisoner had instituted a suit for jactitation, Times, April 22, 1885, p. 10.

¹ *Campbell v. Corlay* (1862), 31 L. J., P. & M., 60.

² *Duchess of Kingston's case* (1776), 20 St. Tr., 355; and see *ante*, Chap. III, p. 130.

³ 20 & 21 Vict., 85, ss. 2, 6, 22.

⁴ Lord Stowell's judgment, *Hawke v. Corri* (1820), 2 Hag. Con., 280.

⁵ *Thompson v. Rourke*, *ubi sup.*

CHAPTER XI

INCIDENTS OF DIVORCE, ALIMONY, VARIATION OF SETTLEMENTS, CUSTODY OF CHILDREN ¹

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SEC. 1.—ALIMONY AND MAINTENANCE

(a) *General*

ALIMONY or maintenance is payable by a husband to a wife ; it is never payable by a wife to a husband.

¹ The practitioner is referred to Dixon on Divorce, 2nd ed., chaps. xi. and xii.

Any pecuniary penalty on a guilty wife is provided for in case she is wealthy under s. 3, p. 394, or by variation of settlements; see s. 4, pp. 396-402.

Further, by a recent legislation, which abolished the penalty of attachment for disobeying an order for restitution of conjugal rights, a wife who refuses to cohabit with her husband may be obliged to make him an allowance; see s. 2, pp. 392-394. Maintenance, interim or permanent, is ordered in suits for dissolution; alimony, in suits for judicial separation.

In nullity suits when the marriage is declared null and void, there is no power to order either permanent alimony or maintenance, and on the decree absolute alimony *pendente lite* ceases (see *post* (b), p. 385); but if there are issue of such void marriage, the Court can provide for them, and thereby for their mother.¹

Alimony and maintenance is always proportionate to the husband's means, and therefore it is incumbent on the wife seeking alimony to show what the husband's means are; and the husband may disprove her estimate by giving evidence that it is too high, or that it is subject to large necessary deductions.

Enforcement of Alimony.—In order that a wife may not, after being ill-treated, be subsequently pauperised, it is most important that adequate alimony or maintenance should be allotted; and that the proper payment to her of the amount so ordered should be secured and enforced. If the wife is entitled to alimony, the means for her recovering and enforcing it should be in every way facilitated. When the husband is petitioner, the wife usually finds little difficulty in obtaining payment of alimony, as the husband is before the Court. But when

¹ *Langworthy v. L.* (1886), 11 P. D., 85, C. A.; and see *post*, s. 6, p. 404.

the wife is the petitioner, it often happens that the husband who has committed a matrimonial offence not only personally leaves the jurisdiction, but removes or alienates his property so as to defeat the just claims of his wife.

It was the old practice of the Court of Chancery to aid the order for alimony given by the Ecclesiastical Court by granting, as against the husband personally, writs *ne exeat regno* so as to prevent him leaving the jurisdiction,¹ and injunctions to prevent him removing or alienating his property,² or if he did, it would set aside the deed.³

The Probate and Divorce Division has now full power, however, of enforcing its own order (see Chap. VII, pp. 250, 251); and a charging order on stock can be obtained.⁴

But the more recent decisions have been adverse to the wife's claims; in one case refusing attachment against a husband for non-payment of the arrears of permanent maintenance,⁵ in another refusing an injunction to restrain a husband from removing his property from the jurisdiction.⁶

Alimony cannot be proved for in bankruptcy,⁷ nor can

¹ See *Pearne v. Lisle* (1749), Amb., 75; *Anon* (1741), 2 Atk., 210; *Head v. H.* (1745), 3 Atk., 293, 547; *ex parte Whitmore* (1750), 1 Dick, 143; *Roebuck v. R.* (1787), 2 Coop. t. Cot., 251, where Lord Eldon, L. C., said he was bound by authorities to grant writ of *ne exeat regno*; and *Haffey v. H.* (1807), 14 Ves., 261, and cases there noted; and *Vanderghucht v. De Blaquière* (1838), 8 Sim, 315; 5 My. & Cr., 229.

² *Anon* (1721), 9 Mod., 43.

³ *Blenkinsop v. B.* (1849), 10 Beav., 277; 12 Beav., 568; 1 De G., M. & G., 495.

⁴ *Holden, ex parte* (1863), 13 C. B., N. S., 641; *Ricketts v. R.* (1891), W. N., 29; *Clarke v. C.* (1873), L. R., 3 P. & M., 57.

⁵ *De Lossy v. De L.* (1890), 15 P. D., 115.

⁶ *Newton v. N.* (1885), 11 P. D., 11, distinguishing, but inexactly quoting, *Noakes v. N.* (1878), 4 P. D., 60.

⁷ *Linton v. L.* (1885), 15 Q. B. D., 239, C. A.; *ex parte Henderson* (1888), 20 Q. B. D., 509, C. A.

it be sued for and judgment signed under Order XIV,¹ nor is it assignable.²

The enforcement of orders and execution is matter of practice lying outside the scope of this work,³ nor is it proper here to canvas the correctness of these latter decisions ; but it is a question of natural justice whether a wife who has been ill-used, insulted, and deserted should be subject to the further injury of being reduced to penury by the successful fraud of her husband ; and if the present powers of the Court are insufficient, it should be matter of legislation to improve its process so as to prevent substantial injustice.

(b) *Alimony and Maintenance pendente lite.*

It was the old established practice of the Ecclesiastical Courts in suits for divorce *a mensa et thoro*, or for restitution of conjugal rights, to grant alimony *pendente lite* ; and by s. 22 of the Matrimonial Causes Act, 1857, this is continued with regard to petitions for restitution or judicial separation.

Also in suits for nullity the Ecclesiastical Courts, as soon as a marriage *de facto* was admitted, allotted alimony *pendente lite* till the marriage was declared null and void.⁴ This practice by s. 22 of the Matrimonial Causes Act, 1857, is binding on the present Court in suits for nullity, and such alimony continues till the decree absolute.⁵

In suits for jactitation there is no power to order alimony.⁶

¹ *Bailey v. B.* (1884), 13 Q. B. D., 855, C. A.

² *Re Robinson* (1884), 27 Ch. D., 160, C. A.

³ See Dixon on Divorce, chaps. xi. and xii. ; and see Edwards on Execution, and Anderson on Execution.

⁴ See *Bird v. Bell* (1753), 1 Lee, 209, 621 ; *Earl of Portsmouth v. Countess of Portsmouth* (1826), 3 Add. Ec., 63.

⁵ *S. v. B.* (1884), 9 P. D., 80 ; and see *ante*, Chaps. V and VI, pp. 214, 225.

⁶ *Thompson v. Rourke*, the Times, 1892, July 14, p. 14.

Also "upon any petition for dissolution of marriage the Court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, as it would have had in a suit instituted for judicial separation."¹

But whether the suit be for dissolution of marriage or for judicial separation, interim maintenance or alimony *pendente lite* is applied for and given on the same principles and on the same proportions; and in this section both are referred to as alimony.

The petition for alimony as a matter of practice lies outside this book, but it may be said that alimony cannot be allotted till a marriage (or in case of a suit for nullity, a marriage *de facto*) is admitted or proved.²

Proportionate amount.—Alimony *pendente lite* is an interim arrangement granted and ordered on the ground of necessity only on the supposition that the wife has no other means of support. So where the husband has only £60 per annum and the wife had a sum of £70 in her hands, she was refused alimony *pendente lite*.³

Also, where the parties have lived separate for many years, the wife supporting herself by her own exertions,⁴ or under money paid by the husband under a separation deed,⁵ or where the wife was actually living with and *supported by* the co-respondent, alimony *pendente lite* was refused.⁶

The *proportion* allotted to the wife by way of alimony *pendente* is usually about a fifth of the husband's income ;

¹ 20 & 21 Vict., c. 85, s. 32.

² See rules 81-94, 189-192, 204, and Form 13, and the cases, *Smyth v. S.* (1824), 2 Add., 254; *Mitchell v. M.* (1853), 1 Spinks, Ec. & Add., 102; *Ellis v. E.* (1883), 8 P. D., 188, C. A.; and see Dixon on Divorce, 2nd ed., chaps. xi. and xii.

³ *Coombs v. C.* (1866), L. R., 1 P. & M., 218.

⁴ *Barrows v. B.* (1867), L. R., 1 P. & M., 553; *George v. G.*, *ib.*

⁵ *Powell v. P.* (1874), L. R., 3 P. & M., 55, 186, decided by the full Court.

⁶ *Holt v. H.* (1868), L. R., 1 P. & M., 610.

but this proportion is regulated by circumstances.¹ "The wife during the pendency of the suit must be presumed not to be guilty, yet she is not to live in the same way as if she were exempt from any imputation. She is, as it were, under a cloud, and should seek privacy and retirement."¹ And where the wife is admittedly guilty of adultery, and the only question at issue, as to which she has appealed, was whether or not the husband also had been guilty of adultery, no more alimony than will suffice for a mere subsistence will be allotted.²

Cessation of Alimony pendente lite.—Alimony *pendente lite* ceases on the decree absolute, and it also usually ceases on the wife being found guilty of adultery; though the Court in its discretion can make an order for its continuance if it thinks that the wife will obtain a new trial and show her innocence.³ Except on a finding of adultery it continues, pending her appeal, notwithstanding, say, a finding of collusion, or the intervention of the Queen's Proctor.⁴

Where the petition is for nullity, the alimony *pendente lite* ceases on the decree *nisi* being made absolute.⁵

(c) *Permanent Alimony*

In cases of judicial separation and restitution of conjugal rights, the Matrimonial Causes Act, 1857, provided that where the application was by the wife the Court might make any order which might be deemed just for the payment of alimony to the wife.⁶

¹ *Hawkes v. H.* (1828), 1 Hag. Ec., 526.

² *Stone v. S.* (1845), 4 N. of C., 274.

³ *Whitmore v. W.* (1866), L. R., 1 P. & M., 96; *Noblett v. N.* (1869), L. R., 1 P. & M., 651; *Dunn v. D.* (1888), 13 P. D., 91, C. A.

⁴ *Jones v. J.* (1872), L. R., 2 P. & M., 333; *Butler v. B.* (1889), 15 P. D., 13.

⁵ *S. v. B.* (1884), 9 P. D., 80.

⁶ 20 & 21 Vict., c. 85, s. 17, and see s. 22; s. 32 refers to maintenance on dissolution. The rules thereon are 81-94, 189-192.

In allotting permanent alimony, the Court is bound by the practice and rules of the old Ecclesiastical Courts.¹

A petition for permanent alimony may be filed after the final decree for judicial separation.²

A separation deed executed between husband and wife usually bars the wife's right to permanent alimony; the Court has no jurisdiction to vary the deed (as it would have in case of dissolution of marriage, see *post*, s. 4, p. 397); and so, as it cannot release either of the parties from their obligations under the separation deed, and these obligations continue, the Court will not add to them except under special circumstances, by ordering permanent alimony.³

The Court has power to order the husband to pay the alimony; it cannot order him to secure the alimony on his property, as it can do with regard to permanent maintenance.⁴

Alimony may be paid either direct to the wife or to a trustee on her behalf.⁵

Where a husband fails to pay alimony, the wife can pledge his credit, and he will be liable for necessities supplied to her.⁶

As to the *proportion* of the alimony, the ordinary rule of the Ecclesiastical Courts, by which the Court is bound, was to allot to the wife a third of the husband's income; but in no case could more than a half be allotted, even though the wife brought more than a moiety into settle-

¹ *Haigh v. H.* (1869), L. R., 1 P. & M., 709.

² *Covell v. C.* (1872), L. R., 2 P. & M., 411.

³ *Gandy v. G.* (1882), 7 P. D., 77, 168, C. A.

⁴ *Hunt v. H.* (1883), 8 P. D., 161; and see *post* (*d*), pp. 388, 389.

⁵ 20 & 21 Vict., c. 85, s. 24.

⁶ *Ib.*, s. 26; as to the husband's ordinary liability for necessities supplied to the wife see *ante*, Chap. IV, pp. 178-182.

ment, and under the settlement the income of the whole of the property was receivable by the husband.¹

Permanent alimony is always larger than alimony *pendente lite*.²

Guilty Wife.—The Court has jurisdiction to order permanent alimony to be paid to a guilty wife; and when the judicial separation is granted on account of the wife's cruelty, the Court usually will order the husband to pay her alimony.³

Cessation.—Permanent alimony stops if husband and wife return to cohabitation.⁴

(d) *Permanent Maintenance*

Power.—"The Court may, if it shall think fit, on any such decree (for dissolution of marriage) order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of her husband, and to the conduct of the parties, it shall deem reasonable; and for that purpose may refer it to any of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed and instrument to be executed by all necessary parties; and the said Court may in any such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed."⁵

The procedure is that a separate petition for maintenance is presented by the wife after the decree *nisi*, stating what the husband's means are. This is served on the husband, and the husband must answer on oath; and

¹ *Haigh v. H.* (1869), L. R., 1 P. M., 609. If the income of the wife's property had been payable to the wife for her separate use, she would, notwithstanding the judicial separation, have retained it, as in judicial separation there is no power to vary settlements; see *post*, ss. 3 and 4.

² *Kempe v. K.* (1828), 1 Hag. Ec., 532.

³ *Gooden v. G.* (1892), P., 1, C. A., following *Prichard v. P.* (1864), 3 Sw. & Tr., 523.

⁴ Per Lord Esher, *Linton v. L.* (1885), 15 Q. B. D., 239, p. 245, C. A., followed *Haddon v. H.* (1887), 18 Q. B. D., 779.

⁵ 20 & 21 Vict., c. 85, s. 32.

evidence is given as to the husband's means before the registrar. The registrar then makes a report as to what amount the husband should secure, and the judge confirms or varies the registrar's report by his order.¹ This order is again referred to the registrar, as to how the amount ordered should be secured, and the deed is settled by the conveyancing counsel to the Court, and an order is made that the husband should execute it; and if he does not he may be attached, and the deed executed by an officer of the Court.²

This Act enables the Court to "secure" to the wife a gross sum, or an annuity for her life to the wife, but not to order payment.³ The usual order is for an annual sum, but sometimes a gross sum is ordered; and if so, the wife receives it out and out as her absolute property.⁴ An order for permanent maintenance made under this power is final, and cannot be varied.⁵

As a general rule, the Court will not interfere with reversionary interests, except under special circumstances, where, for instance, it would be impossible otherwise to secure a provision for the wife.⁶

And further, by way of supplementing the power in the first Act, the Matrimonial Causes Act, 1866, after reciting in the preamble that—

¹ Rules 95-103, 204; *Charles v. C.* (1866), L. R., 1 P. & M., 260. The petition for maintenance may be filed after the decree absolute; *Bradley v. B.* (1878), 3 P. D., 47; and see Dixon on Divorce, 2nd ed., chaps. xi. and xii.

² *Howarth v. H.* (1886), 11 P. D., 68, 95.

³ *Medley v. M.* (1882), 7 P. D., 122, C. A. In permanent alimony the Court has no power to "secure" it on the husband's property, but only to order him to pay; see *ante* (c), p. 386.

⁴ *Lister v. L.* (1889), 14 P. D., 175; 15 P. D., 4, C. A.; in *Howarth v. H.* (1886), 11 P. D., 68, 95, the wife was allotted the gross sum of £9100.

⁵ *Rawlins v. R.* (1865), 4 Sw. & Tr., 158.

⁶ *Harrison v. H.* (1887), 12 P. D., 130, 145.

"It sometimes happens that a decree for dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives;" enacted that "in every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: provided always that if the husband shall afterwards, from any cause, become unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same, as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit."¹

It is only where by reason of the husband having no property, either in England or abroad, no order can be made under the former that the latter Act can be resorted to, or in other words, there is no jurisdiction to proceed under the latter Act if the husband has means. Therefore it is not alternative to the petitioner or the Court to proceed under the former or latter Act, but they must proceed under the former if possible; neither can the order be made in the alternative, that the respondent should either secure maintenance or pay an annual or monthly sum.²

Still the provisions of this Act do not apply exclusively to the case of poor men, but include professional men and merchants in receipt of large incomes by way of fees or trade profits, although such husband have either no capital, or their capital is so locked up in trade that it would "not be easy to secure upon it a fixed sum without doing that which, of course, it is most desirable not to do, namely, to destroy the very means by which the trade is carried on." So the Court may order sums of considerable amount to be paid weekly or monthly, and may from

¹ 29 & 30 Vict., c. 32.

² *Medley v. M.* (1882), 7 P. D., 122, C. A.

time to time modify the order. In this case the husband was a diamond merchant making large but varying profits, £18,000 in one year, and nothing for several years, but on a reputed average of £1700 per annum, and the Court ordered a monthly payment to the wife at the rate of £500 per annum.¹

A separation deed (which the Court has jurisdiction to vary, see *post*, s. 4 (a), p. 397) does not bar the right of wife to permanent maintenance as it would to permanent alimony.²

Proportion allotted to an innocent Wife.—The amount payable to an innocent wife is usually about a third of the husband's income;³ the same principles given being applicable as in permanent alimony.⁴ For instance, the petitioner was only seventeen at the date of the marriage; she had no property, and the husband had £560 per annum; the marriage was dissolved for his cruelty and adultery; there were no children, on which facts maintenance was ordered at the rate of £195 per annum.⁵

Guilty Wife.—As to giving permanent maintenance to a guilty wife, the Master of the Rolls, Sir G. Jessel, laid down—

“The practice seems to have grown up of not allowing maintenance to the guilty wife unless a special case is shown. I am not prepared to say on the present occasion that this is the correct rule. I am not going to lay it down that it is not so. I should require further consideration and argument before doing so, but it appears to me that the 32nd

¹ *Jardine v. J.* (1881), 6 P. D., 213, decided by the full Court of Divorce.

² *Morrall v. M.* (1881), 6 P. D., 98; as to permanent alimony, see *ante* (c), p. 386.

³ See *Jardine v. J.* (1881), 6 P. D., 213, £500 out of £1200 per annum; *Harrison v. H.* (1887), 12 P. D., 130, 145, £110 out of £400 per annum.

⁴ *Sidney v. S.* (1865), 4 Sw. & Tr., 178.

⁵ *Lister v. L.* (1889), 14 P. D., 175; 15 P. D., 4, C. A.

section of the Act has left an absolute discretion in the Court. I think there was good reason for doing so. When a divorce could only be obtained by Act of Parliament, it was in practice only obtained by wealthy persons, because it was very expensive, and it might well be considered right that where a wealthy man had obtained a divorce from a wife who had no means of subsistence, he should, as a condition of being granted that divorce, be compelled to make some provision for her, so that she should not be allowed to starve. But the Divorce Act was meant to apply, not only to wealthy people, but to all people, and, indeed, one of the strong grounds for passing it was that under the then system, the wealthy alone could obtain a divorce. It was thought that this was not a right state of things, and consequently the remedy was made less expensive, so that all classes might be able to resort to it. Now in the case of people of small means very different considerations arise. When a working man who has married a washerwoman obtains a divorce, she can very well go washing again. This is quite a different case from that of a gentleman of large means who obtains a special privilege by Act of Parliament. I should be inclined to say that where a wealthy gentleman obtains a divorce, the Court, in acting under s. 32 (of the first Act), ought to act on a rule somewhat similar to that established in the House of Lords under the old practice, for the reason of the thing appears to be the same ; but we are not to be considered as finally deciding the point, or as laying down any rule for the guidance of the Divorce Court. I am only stating my present impression, that the Court, under s. 32, has full discretion, and is under no obligation to require special circumstances to be shown to entitle the guilty wife to some provision."

But in this case the wife, having been, not only guilty, but vexatious in conducting her litigation, was refused permanent maintenance.¹ And in a recent case permanent maintenance was given to a guilty wife at the rate of 15s. per week.²

But when the wife is guilty, at most a mere subsistence will be allowed.³

Forfeiture on Remarriage or Unchastity.—A clause limiting the maintenance to the wife, *dum sola et costa*

¹ *Robertson v. R.* (1883), 8 P. D., 94, C. A. Further, under variation of settlements it frequently happens that a guilty wife is not deprived of her entire interest in funds brought into settlement by her husband ; see *post*, s. 4, p. 399.

² *Lander v. L.* (1891), P., 161.

³ *Stone v. S.* (1845), 4 N. of C., 274, p. 276.

vixerit, "so long as she remain chaste or unmarried," and on breach of that condition creating a forfeiture, is sometimes inserted in the deed of security.¹ The Court has an absolute discretion whether or not this clause shall or shall not be inserted. In fact, if the maintenance order was by way of giving her a gross sum of money, its enjoyment could not be taken from her on her second marriage; and no rule is laid down whether the annual sum should be payable during the wife's whole life, or until her second marriage.²

However, of late years this clause has usually been omitted when maintenance is granted to an innocent wife,³ especially if the amount is small;⁴ and in such a case where it was only 15s. a week, the *dum sola et casta* clause was struck out by Lord Hannen, Pres., even though the payment was to a guilty wife.⁵

SEC. 2.—PAYMENT IN LIEU OF RESTITUTION OF CONJUGAL RIGHTS

(a) *General*

Previous to 1884, if a respondent to a petition for restitution of conjugal rights did not obey the decree, it was enforced by attachment; *i.e.*, imprisoning him or her till he or she obeyed.⁶ The Matrimonial Causes Act, 1884,

¹ *Fisher v. F.* (1861), 2 Sw. & Tr., 410; *Medley v. M.* (1882), 7 P. D., 122, C. A.; followed *Harrison v. H.* (1887), 12 P. D., 130, 145; and see as to similar clause in variation of settlements, *post*, s. 4, p. 402; and in settlement of damages, Chap. VII, p. 260.

² *Lister v. L.* (1889), 14 P. D., 175; 15 P. D., 4, C. A.; *Wood v. W.* (1891), P., 272, C. A.

³ *Bradley v. B.* (1882), 7 P. D., 237; *Lister v. L.*, *ubi sup.*

⁴ *Wood v. W.*, *ubi sup.*

⁵ *Lander v. L.* (1891), P., 161.

⁶ *Barlee v. B.* (1822), 1 Add. Ecc., 301, where the respondent wife after three years' imprisonment in Norwich gaol was refused her release; and see *Weldon v. W.* (1887), 9 P. D., 52; and see *ante*, Chap. X, pp. 372, 376, 377.

enacted that a decree for restitution of conjugal rights should thenceforth not be enforced by attachment.¹

The Act empowers the Court to order payment of an annuity by the disobedient respondent to the petitioner, and for time to time to vary such order.² The Court has also power to make orders for the custody of children.³

Lastly, non-compliance with the decree is to be deemed equivalent to two years' desertion.⁴

(b) Payment by Husband to Wife

Where the wife is the petitioner, the Court may, at the time of making decree, or afterwards, order, that if the decree is not complied with within a limited time, the respondent husband shall make to the petitioning wife such periodical payments as shall be just. This order to be enforced either as if it were an order for alimony, or the husband may be made to execute a deed securing the periodical payment as if it were a permanent maintenance.⁵

The wife will be put in no worse position than if on a petition for judicial separation she had obtained an order for alimony; and acting on this principle, the same proportion of a third of the husband's income will be allotted to her.⁶

(c) Payment by Wife to Husband

Where the husband is the petitioner, if it appears to

¹ 47 & 48 Vict., c. 68, s. 2; *Weldon v. W.* (1885), 10 P. D., 72. This Act does not apply to Ireland, so there a decree for restitution of conjugal rights is still enforceable in the old way by attachment. See *ante*, p. 377, and *post*, Chap. XIX.

² *Ib.*, ss. 2, 3; the application is to be by petition, rules 214, 215.

³ *Ib.*, s. 6, rules 214, 215; and see *post*, pp. 404-408.

⁴ *Ib.*, s. 5; and see *Harding v. H.* (1886), 11 P. D., 111; and *Bigwood v. B.* (1888), 13 P. D., 89; and Chap. VII, pp. 344, 353, 377.

⁵ *Ib.*, s. 2.

⁶ *Theobald v. T.* (1889), 15 P. D., 26.

the Court that the wife is in possession of any property, or in receipt of any profits of trade or earnings, the Court may order a settlement to be made of the whole or part of such property for the benefit of the petitioning husband and children, or either of them ; or may order a part of the trade profits and earnings of the wife to be periodically paid by the wife to the petitioning husband for his own benefit, or for the benefit of the children, or either.¹

As to the proportion to be settled on or paid to the husband, the Court may take into consideration the general conduct of the parties, but will not go into a minute debtor and creditor account of sums contributed by the husband and wife respectively to household expenses.²

In no case can property of the wife, as to which her "anticipation is restrained," be touched by the Court under this power, or taken from her.³

SEC. 3.—PENALTIES ON GUILTY WIFE

A guilty wife cannot be ordered to pay permanent or interim maintenance or alimony to her husband (see *ante*, pp. 380, 381, 393) ; although her interest under the marriage settlement may be taken away (see *post*, s. 4, pp. 400–402). But a rich guilty wife may be penalised by making her settle her existing or subsequently acquired property for the benefit of the innocent husband or the children. For it is provided—

“In any case in which the Court shall pronounce a sentence of divorce or judicial separation for the adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think

¹ 47 & 48 Vict., c. 68, s. 3.

² *Swift v. S.* (1891), P., 129.

³ *Michell v. M.* (1891), P., 166, 208, 305, C. A. ; as to restraint on anticipation, see p. 193.

proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."¹

And such instrument is to be valid notwithstanding the coverture of the wife.²

The Court can, of course, deal with all the wife's unsettled reversionary interests and other property in possession which is secured to her for her separate use. But the Court cannot under this power alter a settlement so as to make a wife settle and deal with property which she would otherwise not be able to alienate. For instance, the wife cannot be deprived under this power of property as regards which her anticipation is restrained,³ nor can a power of appointment vested in her be extinguished.⁴

If, however, the wife has a life interest under a settlement as to which her anticipation is not restrained, which she might therefore alienate or encumber, she may be ordered to settle this on the husband or children,⁵ even although there is a forfeiture clause on alienation.⁶

It was in consequence of these limitations on the power of the Court in dealing with the wife's property under this Act and section, that the more extended power of varying settlements was conferred by a subsequent Act (see *post*, s. 4, pp. 396-402), in case of a decree of nullity or dissolution of marriage.

The proper procedure is, after the decree *nisi*, to order an *inquiry into the details and particulars of the wife's property*, in order that the settlement may be ordered

¹ 20 & 21 Vict., c. 85, s. 45; and see rule 95.

² 23 & 24 Vict., c. 144, s. 6.

³ *Norris v. N.* (1858), 1 Sw. & Tr., 174; as to restraint on anticipation, see p. 193.

⁴ *Seatel v. S.* (1860), 4 Sw. & Tr., 230.

⁵ *Seatel v. S.*, *ubi sup.*, explained *Michell v. M.* (1891), P., 208, p. 211.

⁶ *Milne v. M.* (1871), L. R., 2 P. & M., 295.

as soon as the decree absolute is pronounced.¹ As to how this power will be exercised, but few cases have yet arisen; so no rule can be laid down. Where a wife had only £100 a year from land, and £15 a year under a settlement, the Court, leaving untouched the £15, ordered two-thirds of the £100 per annum to be settled on the children for their immediate possession, and the remaining one-third to be settled to come to them after the wife's death.² In another case, where the wife had £3000 per annum under her father's will, which it appeared the co-respondent speculated on enjoying, the Court only deprived her of £500 per annum, which was settled on the husband.³

SEC. 4.—VARIATION OF SETTLEMENTS

(a) *Power of the Court*

“The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of antenuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit;”⁴ and this power may be exercised “notwithstanding that there are no children of the marriage.”⁵

The power conferred by this section does not extend to cases where the decree is only for judicial separation,⁶ or where the decree for dissolution has been pronounced by

¹ *Midwinter v. M.* (1892), P., 28, C. A.

² *Bacon v. B.* (1860), 2 Sw. & Tr., 86.

³ *Milne v. M.* (1871), L. R., 2 P. & M., 295.

⁴ 22 & 23 Vict., c. 61, s. 5; the application is by petition, see rules 95-103, 204.

⁵ 41 Vict., c. 19, s. 3; *Ansdell v. A.* (1880), 5 P. D., 138. Previous to the latter Act this power could not be exercised if there was no issue; *Corrance v. C.* (1868), L. R., 1 P. & M., 495.

⁶ *Gandy v. G.* (1882), 7 P. D., 168, C. A.

a Colonial Court ;¹ but the Act gives jurisdiction whenever there is a decree absolute for dissolution by the Probate and Divorce Division. A decree *nisi* gives no jurisdiction ; and if the petitioner dies after the decree *nisi* the suit abates, and no petition can be presented if the petitioner dies before the decree is made absolute ;² *aliter* if the petitioner dies after the decree absolute, when the children's guardian, but not the petitioner's executor, can petition.³

So under this power the Court has jurisdiction to alter and vary, not only the ordinary English marriage settlement, but also a Scotch settlement⁴ or a separation deed.⁵ It can deal with capital as well as income,⁶ or make an order as to mere annuity,⁷ or extinguish a power of appointment among the children vested in either party.⁸

But once the order has been made the Court has no jurisdiction to alter it on proof of any subsequent change of circumstances ; for the power is one to be exercised once for all.⁹

The Court, however, has no power to vary a settlement so as to inflict a forfeiture on any other persons than the

¹ *Moore v. Bull* (1891), P., 279.

² *Grant v. G.* (1862), 2 Sw. & Tr., 522 ; and see *Midwinter v. M.* (1892), P. 28, C. A.

³ *Ling v. L.* (1865), 4 Sw. & Tr., 99 ; *Smithe v. S.* (1868), L. R., 1 P., & M., 587.

⁴ *Nunneley v. N.* (1890), 15 P. D., 186 ; *Forsyth v. F.* (1891), P., 363.

⁵ *Worsley v. W.* (1869), L. R., 1 P. & M., 648 ; *Bullock v. B.* (1872), L. R., 2 P. & M., 389 ; *Jump v. J.* (1883), 8 P. D., 159 ; *Clifford v. C.* (1884), 9 P. D., 76, C. A. ; and see *Benyon v. B.* (1876), 1 P. D., 447, as the regard to be paid to a separation deed. *Aliter* in case of permanent alimony, see *ante*, s. 1 (c), p. 386 ; and as to permanent maintenance, see *ante*, s. 1 (d), p. 390.

⁶ *Ponsonby v. P.* (1884), 9 P. D., 58, 122, C. A.

⁷ *Jump v. J.*, *ubi sup.*

⁸ *Noel v. N.* (1885), 10 P. D., 179 ; *Bosville v. B.* (1888), 13 P. D., 76.

⁹ *Benyon v. B.* (1890), 15 P. D., 29 and 54, C. A. ; and see *Gladstone v. G.* (1876), 1 P. D., 442.

petitioner or respondent. So although the Court can vary it so as to benefit an infant, it has no power to vary a marriage settlement so as to deprive an infant child of the marriage of an interest secured to the infant by such settlement, even by way of a compromise that might be beneficial to the infant.¹ So any interest given to the petitioner must be carved out of the respondent's interest under the settlement.²

Where after the decree *nisi* the respondent was about to dispose of her property before an order to vary the settlements could be obtained, the Court restrained her by injunction from dealing with it.³

(b) *Principles and Proportions of Division*

The Court of Appeal has laid down that the statute confers an absolute judicial discretion to order what will be for the benefit of the parties or their children, or either of them; and though this power is not given for the purpose of punishing the guilty respondent, but for making due provision for all parties, yet the respective conduct of husband is to be taken into consideration in determining what provisions it would be reasonable to make.⁴

In exercising so unlimited a discretion in so many varying circumstances, it is difficult to lay down any rule. But in general terms it may be said as follows:—As regards the *respondent* it is the usual course for the

¹ *Crisp v. C.* (1872), L. R., 2 P. & M., 426, not even if the child is alleged to be illegitimate; *Pryor v. P.* (1887), 12 P. D., 165; neither can the Court interfere with a settlement as far as it provides for the issue of a second marriage and for next of kin in default of issue; *Smith v. S.* (1887), 12 P. D., 102.

² *Forsyth v. F.* (1891), P., 363.

³ *Noakes v. N.* (1877), 4 P. D., 60.

⁴ *Wigney v. W.* (1882), 7 P. D., 177, C. A.

Court to extinguish the guilty *husband's* interests in all funds brought into settlement by the petitioning wife, although an exception might be introduced in favour of a guilty husband incapacitated by physical infirmity from earning a livelihood and without means of his own.¹

As regards a guilty *wife*, the Court is more compassionate, and sometimes extinguishes,² and sometimes only reduces,³ the interest under the settlement which she has obtained from her husband, although a guilty wife is more usually provided for by way of alimony or maintenance.

Innocent Petitioner.—It would be contrary to natural justice that it should exercise this power, except where the respondent wife was penniless, or the husband a pauper cripple (see *supra*), so as to deprive the innocent petitioner of any part of the funds brought into settlement by him or her ; still, in one case, under somewhat special circumstances, the wife was, on condition of being put in possession of her own fortune, directed to pay the large debts incurred during cohabitation in keeping up the joint establishment, such debt being due from the husband, who was almost penniless.⁴

In fact, if there are no children or no ultimate trusts in the settlements for strangers (as to which, see *ante*, pp. 397, 398), the Court will, on the application of the petitioner, and unless the respondent can make out a good case to the

¹ *Maudslay v. M.* (1877), 2 P. D., 256 ; *Wigney v. W.* (1882), 7 P. D., 177, C. A. ; *Harrison v. H.* (1887), 12 P. D., 130, 145.

² *Milne v. M.* (1871), L. R., 2 P. & M., 295 ; *Symonds v. S.* (1872), L. R., 2 P. & M., 447 ; *Pryor v. P.* (1887), 12 P. D., 165.

³ *Clifford v. C.* (1884), 9 P. D., 76, C. A. ; *Bosville v. B.* (1888), 13 P. D., 76.

⁴ *Wigney v. W.* (1882), 7 P. D., 177, C. A. ; and see *Thompson v. T.* (1862), 2 Sw. & Tr., 649.

contrary, order the funds brought into settlement by each party to be retransferred to each of them respectively free from the trusts of the settlement.¹

Respondent's own Fortune.—Lastly, as to depriving the guilty respondent of all or part of the funds brought into settlement by him or her. As regards the respondent *husband*, it is usual to make him provide for his wife by orders of alimony and maintenance (see *ante*, s. 1, pp. 386, 387, 390); but occasionally provision is thus made for the petitioning wife.²

But as regards a respondent *wife*, this (and the power under 20 & 21 Vict., c. 85, s. 45, see *ante*, s. 3, p. 394, which is very occasionally had recourse to) is the usual way by which a rich guilty wife may be made to provide for her innocent husband and children.

As to the principles on which the Court should act on such an application, it was laid down in the first case arising under this statute by the Judge Ordinary, Lord Penzance, and the full Court of Divorce—

“The Court will look at the probable pecuniary position which the parties and their children would have occupied if the marriage which the settlement contemplated had been a binding union, and the parties had lived in harmony together upon their joint incomes. If this union has been broken, and the common home abandoned by the criminality of one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage vow, be wholly deprived of means, to the scale of which he may have learnt to accommodate his mode of life; nor, viewing the matter on the other side, does it seem either just or equitable that funds which were intended, at the time of the marriage, for the use of both should be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of a second marriage. The interests of society point in the same direction. It

¹ See *A. v. M.* (1884), 10 P. D., 178, a case of nullity where there were no children.

² *Ponsonby v. P.* (1884), 9 P. D., 58, 122, C. A.; and see *Chetwynd v. C.* (1865), L. R., 1 P. & M., 39.

would be of evil example if this Court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman.”¹

But the power must not be exercised to punish the guilty party, but to provide for the petitioner and the children;² neither can it be exercised to punish a respondent who was in contempt by removing a child from the jurisdiction, and for the collateral purpose of enforcing the order of the Court.³

In this case, where the petitioner was a clerk in the Foreign Office, at £260 per annum, possessing no other means, and the respondent had brought into settlement £1458 per annum, the adulterous wife was ordered to pay the petitioner £440 per annum during their joint lives, and a further sum of £200 per annum for the maintenance, by the petitioner, of the sole child, for so long as such child should remain in his custody.⁴

And in another case where there were no children, and the wife had £1050 per annum under the settlement, the Court directed that £300 per annum should be paid to the petitioner, who was a colonel with £600 per annum.⁵

In another case where the whole of the property settled came from the respondent's mother, and amounted to £150 per annum, and the respondent and co-respondent had intermarried, the Court ordered the whole of it, not to be

¹ *March v. M.* (1867), L. R., 1 P. & M., 440.

² *Wigney v. W.* (1882), 7 P. D., 177, C. A.

³ *Symonds v. S.* (1872), L. R., 2 P. & M., 447.

⁴ *March v. M.* (1867), L. R., 1 P. & M., 440; in *Noel v. N.* (1885), 10 P. D., 179, the petitioning husband was given £200 per annum out of the wife's £400 per annum, for himself and two children; in *Benyon v. B.* (1876), 1 P. D., 447, the husband was given £300 per annum for life for himself, and £100 per annum for the maintenance of a child out of the wife's £1350 per annum.

⁵ *Farrington v. F.* (1886), 11 P. D., 84.

paid to the petitioner, but to be applied for the benefit of the three children.¹

(c) *Condition of Chastity*

Occasionally, but only exceptionally, a condition is inserted whereby the provision for the wife is forfeited on her remarrying or becoming unchaste. As to this, President Sir James Hannen laid down—

“I think it is perfectly reasonable in those cases where a husband is called upon to sacrifice a portion of his means, that the condition *dum sola et casta vixerit* should be imposed ; but I am of opinion that where the effect of the order is only to deprive a husband of his interest in the wife's fortune, and to put the innocent wife into immediate possession of her own income, no such condition should be imposed.”²

SEC. 5.—COSTS

The costs of the proceedings are in the discretion of the Court ; *i.e.*, the Court has full power, whatever the event be, to order any of the parties to bear the costs ; and there is no appeal as to costs.³

Costs are a matter of practice which does not fall within the scope of this work. As between the petitioner and co-respondent, the costs are generally awarded according to the ordinary principles of litigation, *victus victori*

¹ *Paul v. P.* (1870), L. R., 2 P. & M., 93.

² *Gladstone v. G.* (1876), 1 P. D., 442 ; thus distinguishing *Chetwynd v. C.* (1865), L. R., 1 P. & M., 39, where the *dum costa* clause was inserted. In a case of settling damages on the wife, a condition of forfeiture was imposed in case of the respondent not living chastely or marrying the co-respondent, who was a married man ; *Meyern v. M.* (1876), 2 P. D., 254 ; see *ante*, Chap. VII. As to the insertion of the *dum sola et casta* condition in permanent maintenance and alimony, see *ante*, 1 (d), pp. 391, 392 ; and see Chap. VII, p. 260, as its insertion as a settlement of damages.

³ 20 & 21 Vict., c. 85, s. 51 ; and see *Butler v. B.* (1890), 15 P. D., 126, C. A. ; *Russell v. R.* (1892), P., 152, C. A.

in expensis damnætur; and a co-respondent against whom adultery has been established may be ordered to pay the whole or any part of the costs.¹ As to the costs of intervention by the Queen's Proctor or one of the public, see *ante*, Chap. VII, pp. 263, 267.

As between husband and wife, there was a practice in the Ecclesiastical Courts differing from the practice in ordinary litigation, that the costs of the wife, even in a suit for nullity, whether petitioner or respondent, were borne by the husband.² The reason of this practice was, that according to the old Common Law (see Chap. IV), it was supposed that the wife had no property, and that the husband had all, and it was proper that the wife should be furnished with funds to litigate with, to protect herself, so that a solicitor might be willing to act for her. And this practice continues now; and the wife can, previous to the trial, apply that her husband should pay into Court or secure a sum sufficient to cover the costs of the hearing.³

If, however, the wife, in fact, has separate property, and more especially since the Married Women's Property Act, 1882 (see *ante*, Chap. IV, pp. 188–191), a wife with means, if unsuccessful, will be and has been condemned in costs.⁴

¹ 20 & 21 Vict., c. 85, s. 34; and see *ante*, Chap. VII, s. 2, pp. 255, 256, 261, 267, for instances in which an unsuccessful co-respondent is not condemned in costs.

² See *Green's case* (1625), Cro. Car., 16; Oughton, tits. ccvi.–ccviii.; *Earl of Portsmouth v. Countess of Portsmouth* (1826), 3 Add. Ec., 63; *Bell v. Bird* (1753), 1 Lee, 209, 601; and at Common Law the costs of the wife's legal proceedings were necessities for which the husband was liable, and for which the wife could pledge his credit; see Chitty on Contracts, 12th ed., p. 282; *Rice v. Shepherd* (1862), 12 C. B., N. S., 332; *Ottaway v. Hamilton* (1878), 3 C. P. D., 393, C. A., and *ante*, Chap. IV, p. 180.

³ See rules 158, 159, 177–179, 199–201; and see the principle of this explained, *Robertson v. R.* (1881), 6 P. D., 119, C. A.; *Smith v. S.* (1882), 7 P. D., 84.

⁴ *Milne v. M.* (1871), L. R., 2 P. & M., 202; *Ottway v. O.* (1888), 13

SEC. 6.—CUSTODY OF CHILDREN

(a) *General*

In suits for judicial separation, nullity, or dissolution of marriage, the Court has power to make interim orders and provide, in and after its final decree, with respect to the maintenance, custody, and education of the children of the marriage in question, or may direct the children to be made wards of Court.¹ A similar power is now conferred on the Court in applications for a decree for restitution of conjugal rights, if the respondent fails to comply.² But there is no such power in suits for jactitation.³

On the death of the person in whom the custody is vested by the Courts (*i.e.*, of the petitioner as is usual, see *post*, p. 406), the custody would, previous to 1886, have reverted to the respondent husband or the guardian. By the Guardianship of Infants Act, 1886, the Court can declare that the guilty respondent is unfit to have the custody of the children; and in such case the parent so declared to be unfit shall not upon the death of the other parent be entitled as of right to the custody or guardianship of the children.⁴

Children of a marriage declared void can be ordered by

P. D., 141, C. A.; *Russell v. R.* (1892), P., 152, C. A.; *Robson v. R.* (1891), 29 L. R. Ir., 152.

¹ 20 & 21 Vict., c. 85, s. 35, and 22 & 23 Vict., c. 61, s. 4; rules 104, 195, 212; and see *Hunt v. H.* (1883), 8 P. D., 161. The Ecclesiastical Courts had no jurisdiction as to the custody of children; see *Greenhill v. G.* (1836), 1 Curt., 462, which previous to and outside this power is vested in the Chancery Division; see Chap. XIV, pp. 435-445, 450-453.

² 47 & 48 Vict., c. 68, s. 6; and see rules 214, 215; and see *ante*, Chap. X, p. 377.

³ *Thompson v. Rourke*, the Times, 1892, July 14, p. 14.

⁴ 49 & 50 Vict., c. 27, s. 7; and see *Skinner v. S.* (1888), 13 P. D., 90. In default of such an order, the custody or guardianship will follow the ordinary law; see Chap. XIV, s. 3.

the Court to be provided for by way of maintenance paid by the petitioner.¹ The Court has jurisdiction to regulate custody of children up to the age of sixteen.² As to children over that age it has therefore no jurisdiction or power to make orders, either in regard of their custody, education, or maintenance.³ So in a case where the marriage of the Marquis and Marchioness of Blandford had been dissolved some years previous for the husband's adultery and desertion, and a supplemental petition was presented praying that the husband (now Duke of Marlborough) might be ordered to make some provision for his eldest son, a young man between twenty and twenty-one, the petition was dismissed.³

As to how this jurisdiction will be exercised, no hard and fast rule is laid down; in every case the Court is bound to do what it considers to be the best for the interests of the children. The Court has a wide and unfettered discretion, a discretion overriding both the Common Law and Chancery rules as to custody of children previously in force; the judge is not bound by those rules, though he will have regard to them.⁴

If the person, whether husband or wife, against whom an order is made to deliver up the children, removes them and does not obey, he or she will be committing contempt of Court, and can be proceeded against, *i.e.*, by sequestration or attachment.⁵ Also, if it is the petitioner who fails to obey the order of the Court to provide for the

¹ *Langworthy v. L.* (1886), 11 P. D., 85, C. A.

² *Mallinson v. M.* (1866), L. R., 1 P. & M., 221; *Ryder v. R.* (1861), 2 Sw. & Tr., 225.

³ *Blandford v. B.* (1892), P., 148; but see *Ryder v. R.*, *ubi sup.*

⁴ *Symington v. S.* (1875), L. R., 2 Sc. & D., 415; *Handley v. H.* (1891), P., 124, C. A.; *Witt v. W.* (1891), P., 163; and see *Robotham v. R.* (1858), 1 Sw. & Tr., 190; *Marsh v. M.* (1858), 1 Sw. & Tr., 312.

⁵ *Hyde v. H.* (1885), 13 P. D., 166, C. A.; *Allen v. A.* (1885), 10 P. D., 187; *Boyd v. B.* (1859), 1 Sw. & Tr., 562.

children, the Court can refuse to make the decree *nisi* absolute until the petitioner obeys.¹ The custody, etc., order is not final, and it may, on different circumstances arising, be subsequently varied by the Court.²

But there is no power to direct that the provision ordered for the children should be "secured" by the respondent.³

(b) In the Innocent Petitioner

As a general rule the custody of the children is always given to the innocent petitioner, whether husband or wife, in the absence of special circumstances to the contrary (see *post*, p. 407). The principle is, that the innocent party shall suffer as little as possible by the dissolution of the marriage. The wife ought not to be obliged to buy the relief to which she is entitled at the price of being deprived of the society of her children.⁴

However, the wife will not be given the custody for the express avowed purpose of proselytising them into a religion different from the father's;⁵ and where the petitioning wife, after obtaining a decree of dissolution and the custody of the children, subsequently fell into bad habits, cohabiting with a young man, and taking to drink; and, on the other hand, the respondent husband had remarried and was leading a respectable life,—the daughter was removed from the custody of the mother and placed under the charge of the father.⁶

¹ *Langworthy v. L.* (1886), 11 P. D., 85, C. A.

² *Witt v. W.* (1891), P., 163, not following *Robotham v. R.* (1858), 1 Sw. & Tr., 190; and see *March v. M.* (1867), L. R., 1 P. & M., 437.

³ *Hunt v. H.* (1883), 8 P. D., 163.

⁴ See *Symington v. S.* (1875), L. R., 2 Sc. & D., 415; *Milford v. M.* (1869), L. R., 1 P. & M., 715; *D'Alton v. D'A.* (1878), 4 P. D., 87.

⁵ *D'Alton v. D'A.*, *ubi sup.*

⁶ *Witt v. W.* (1891), P., 163; and see *March v. M.* (1867), L. R., 1 P. & M., 437.

(c) *In the Guilty Respondent*

An adulterous *wife* is, as a general rule, deprived of the custody of and even the access to the children.¹

As regards an adulterous *husband*, where the adultery was a single isolated act which had ceased, the House of Lords, considering the father was engaged in a prosperous business, that he was affectionately attached to his children, and that to separate him from the sons would not be to their advantage, gave to respondent husband the custody of the *male* children.² Also, where a judicial separation was granted against a husband for cruelty, he was allowed access to the children.³

(d) *In a Third Party*

As a general rule, the custody of the children is given to the husband or wife, even though a third party is willing to take and to pay for them; still the petitioner will be given the custody, and the respondent ordered to pay maintenance.⁴

But where, although the petitioning wife had obtained a dissolution for her husband's adultery and cruelty, the Court considered her not only extravagant, but grossly indiscreet in conduct up to the very verge of criminality, the custody of the children was intrusted to the uncle, and right of access being reserved to the father and mother.⁵

Also, where the petitioning wife sought the custody

¹ *Handley v. H.* (1891), P., 124, C. A.; *Clout v. C.* (1861), 2 Sw. & Tr., 391; *Bent v. B.* (1861), 2 Sw. & Tr., 392.

² *Symington v. S.* (1875), L. R., 2 Sc. & D., 415; and see Lord Hannen's remark in *Skinner v. S.* (1888), 13 P. D., 90.

³ *Marsh v. M.* (1858), 1 Sw. & Tr., 312.

⁴ *Milford v. M.* (1869), L. R., 1 P. M., 715.

⁵ *Chetwynd v. C.* (1865) L. R., 1 P. & M., 39; and see *Davis v. D.* (1889), 14 P. D., 162.

of the children for the avowed purpose of proselytising them into a religion other than the father's, the custody was vested in a schoolmistress, with a right of access by both husband and wife.¹

The third party can apply for the custody to the Divorce Court,² but not after the death of either of the spouses ; then the application must be to the Chancery Division.³

¹ *D'Alton v. D'A.* (1878), 4 P. D., 87.

² *Godrich v. G.* (1878), L. R., 3 P. & M., 134 ; *March v. M.* (1867), L. R., 1 P. & M., 437 ; *Chetwynd v. C.* (1865), 4 Sw. & Tr., 151.

³ *Davis v. D.* (1889), 14 P. D., 162 ; and see *post*, Chap. XIV, pp. 435-445, 450-453.

CHAPTER XII

BREACH OF PROMISE OF MARRIAGE, SEDUCTION, AND AFFILIATION ORDER

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SEC. 1.—BREACH OF PROMISE OF MARRIAGE¹

(a) *General*

THERE were originally two alternative remedies in case of a breach of a promise of marriage: for specific performance in the Spiritual Court to compel the defendant to fulfil his promise, or in the Temporal Court for damages. The action in the Spiritual Court, to compel a marriage by reason of a contract, was abolished in 1753 by Lord Hardwicke's Act.² After this date the action for damages became much more common, but the right of action existed from an early date.³

¹ See Chitty on Contracts, 12th ed., pp. 617-622; Roscoe's Nisi Prius, Evidence; Bullen and Leake on Pleading, 4th ed., vol. i., p. 266, tit. Marriage. See Rules of Supreme Court, App. A, pt. iii., sec. 4, Indorsement of Writ; App. C, sec. v., No. 10, Statement of Claim; App. D, secs. iv., v., 1, 16, Defences.

² See *ante*, Chap. I, where an account of the action is given, pp. 8-10.

³ As early as 1469 there are traces of this action; see Y. B., 8 Ed. IV, 4b, dicta by Genney and the Chancellor; but it was only in the middle of the seventeenth century that marriage was recognised by the law as a

A resolution in favour of abolishing the action for breach of promise of marriage, "except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss," introduced by Mr. Herschell, Q.C., now Lord Herschell, was carried in the House of Commons by 106 votes to 65, May 6, 1879.¹

This action may be brought by either the man or the woman; but actions by men are rare, and when brought usually result in nominal damages.²

The action is a personal one, and like other personal actions, abates on the death of either party, and cannot be brought by or against the deceased's executors or administrators unless special damage, and that of a very exceptional nature, and affecting the money value of the contract to the fee, is alleged.³ Either plaintiff or defendant has a right to a jury.⁴ The action cannot be tried in the County Court except by consent of both parties.⁵

(b) *The Promise*

The promise must be a reciprocal one, and binding both parties, otherwise it cannot be sued upon. There

temporal benefit for loss whereof, and breach of the promise action lay in the Temporal Courts. Rolle, Abr., tit. Actions, fol. xxii., par. 20; *Holder or Holcroft v. Dickeson* (1673), Free, pt. 1, 95, and 347; and per Bowen, L. J., *Finlay v. Chirney* (1888), 20 Q. B. D., 494, p. 505, C. A.

¹ Hansard, vol. ccxlv., pp. 1867-1889. Generally throughout Europe the law is substantially what Lord Herschell's resolution would have made it here, but the American Law is the same as our own.

² See *Harrison v. Cage* (1698), 1 Ld. Raym., 386; and at Chester Assizes, July 1892, a man recovered £40.

³ *Chamberlain v. Williamson* (1814), 2 M. & S., 408; *Finlay v. Chirney* (1888), 20 Q. B. D., 494, C. A.; the birth of a child, and getting wedding clothes, is not sufficient special damage, *ib.*

⁴ R. S. C., Ord. XX. 36, r. ii.

⁵ County Courts Act, 1888, 51 & 52 Vict., c. 43, s. 56.

is, however, an exception to this rule; for an infant can sue for breach of promise of marriage,¹ although he or she cannot be sued for a promise made during infancy.²

The promise need not be in express words, but may be evidenced by the unequivocal conduct of their friends and relations, that a marriage is to take place. Neither need the promise be in writing, although letters are the most usual evidence in corroboration. Also, the engagement is binding although no precise time for completion by marriage is fixed; for, in such case, the law presume a promise to intermarry within a reasonable or convenient time.³

A promise of marriage by the defendant in consideration that the plaintiff would have connection with him is void; but if he renewed his promise after the illicit intercourse had taken place, it would be binding.

If the parties are related within the prohibited degrees so that their marriage would be invalid, the promise is void, and affords no ground of action.³ A promise by a married man is valid, because his wife might have died.⁴

Corroboration.—A peculiar legal feature of this action is that it has been specially enacted that no plaintiff “shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.”⁵ Corroborative evidence is usually supplied by the plaintiff’s friends or relations, or by letters from the defendant; letters from the plaintiff

¹ *Holt v. Ward* (1732), 2 Str., 937.

² *Coxhead v. Mullis* (1878), 3 C. P. D., 439; *Northcote v. Doughty* (1879), 4 C. P. D., 385; *Holmes v. Brierley* (1888), 36 W. R., 795 C. A.; and see Chap. XIV, s. 5 (a), p. 463.

³ *Harrison v. Cage* (1698), 1 Ld. Raym., 386, 387.

⁴ *Wild v. Harris* (1849), 7 C. B., 999; *Milward v. Littlewood* (1850), 5 Ex., 775.

⁵ 32 & 33 Vict., c. 68, s. 2; and as to corroboration, see *post*, p. 415.

charging the defendant with promising to marry her, which the defendant does not answer, do not amount to an admission against him, or to evidence corroborative of the promise.¹

(c) *Defences*²

The usual defence is to deny the promise. It is also a ground of defence that, after promise, the plaintiff discharged and absolved the defendant from his promise, and the performance thereof.³ And the fact of their having been, for a considerable period, a total cessation of intercourse and correspondence between the parties, is evidence in support of this defence.⁴

It is also a defence that the promise was obtained by fraudulent concealment of the plaintiff's previous circumstances and life; and it is under this head that it is frequently alleged that the defendant subsequently discovered that the plaintiff was unchaste, and on this account the defendant broke off the engagement. But the fact that the plaintiff did not tell the defendant that at the time of the defendant's promise she was engaged,⁵ or that she had been previously insane, is no defence,⁶ unless such concealment be *fraudulent*.

A plea that the defendant, after the promise, became afflicted with a disease which made him incapable of marriage without great danger to his life, and, therefore, unfit for the married state, is bad in law.⁷ It would,

¹ *Wiedemann v. Walpole* (1891), 2 Q. B., 534, C. A.

² See Bullen and Leake, 4th ed., vol. ii., p. 267, tit. Marriage; and see *ante*, p. 409, n. 1.

³ *King v. Gillett* (1840), 7 M. & W., 55.

⁴ *Davis v. Bomford* (1860), 6 H. & N., 245; and see *Colvin v. Johnstone* (Nov. 14, 1890), 18 R., 115.

⁵ *Beachey v. Brown* (1860), E. B. & E., 796.

⁶ *Baker v. Cartwright* (1861), 30 L. J., C. P., 364.

⁷ *Hall v. Wright* (1858), E. B. & E., 746, Ex. Ch.

however, appear that a plea that the plaintiff was, subsequent to the promise, discovered to be impotent or suffering from an abscess, would be a good defence.¹

A Protestant defendant apparently might lawfully, if acting *bonâ fide*, refuse to be married by a Roman Catholic priest, or to sign the condition of a dispensation as given in Appendix 3.

(d) *Damages*

The damages are peculiarly a matter for the jury. And it often happens that even by public performers large sums are recovered. It is very rare that a new trial has been granted for excess of damages, although in one recent case £10,000 damages were reduced to £6500.² In ascertaining the measure of the damages, the jury are not limited to the mere pecuniary loss that the plaintiff has sustained, but may take into consideration her injured feelings and wounded pride.³ The fact that the defendant had seduced the plaintiff under the promise of marriage may be given in evidence in aggravation of damages, the jury considering her to return home in a dishonoured position.³

(e) *Return of Presents*

If wedding presents are made either by the intending husband and wife to each other, or by strangers to either the man or the woman, it appears to be the law that if such marriage does not take place the presents can be recovered back by an action, because they were given subject to the implied condition subsequent that the

¹ See *Atchinson v. Baker* (1797), 2 Peake, 103.

² *Knowles v. Duncan*, see the Times, Jan. 30, p. 13, and 31, p. 4, 1891.

³ *Berry v. Da Costa* (1866), L. R., 1 C. P., 331; *Mayne on Damages*, 4th ed., pp. 458-461; and see *Millington v. Loring* (1880), 6 Q. B. D., 190, C. A.

marriage should take place, which condition is not fulfilled. In favour of strangers this would apply for whatever reason the marriage did not take place. As between the intending spouses it would only apply when the rescission was by consent, or where it was the donee who was in default; for if the donor had broken off the engagement, he would be in the position of one who, by his own act, has made the fulfilment of the condition impossible, therefore such donor in default cannot recover back his presents.¹

SEC. 2.—SEDUCTION

This action can only be instituted by the employer of the woman seduced, whether that employer be her father or any other person. The action can never be brought by the woman herself, whose remedy is by action for breach of promise of marriage, or for an affiliation order. This action cannot be tried in a County Court.²

The gist of the action is loss of service brought about by the defendant's act. Therefore, in order that the father may make out his cause of action, he must prove that she was in his service; therefore, if she is in service, and employed by some one else, the father cannot sue. If she is under age, unmarried, and living at home, she is *prima facie* presumed to be in his service; but if over twenty-one, some proof of actual service must be given;

¹ See Lord Hardwicke's judgment, *Robinson v. Cumming* (1742), 2 Atk., 408; *Anon.*, cited Freeman, 214; *Young v. Burrill* (1576), Cary, 77, where the plaintiff recovered back a gold pomander from the woman; and see Co. Lit., 204a; and in Law's Resolutions of Women's Rights, 1632, bk. ii., sec. 32, it is stated that if the engagement is broken off, the man can get the presents back, but *si osculum intervenerit* he can only get back half; but in either case the woman can get back all.

² County Courts Act, 1888, 51 & 52 Vict., c. 43, s. 56.

but any participation in household duties, *e.g.* making tea, is evidence of service.¹

Either party has a right to a trial by jury.²

The jury will be right in giving liberal damages though the actual money loss in service may be slight.³ The discharge in bankruptcy of the defendant does not release him from liability under a judgment for damages in this action.⁴

SEC. 3.—AFFILIATION ORDER⁵

The mother of a bastard, if single, or if married, living separately, can summons the alleged father before the Police Court of her district (see pp. 361, 362); and on proof of paternity, the woman's evidence being corroborated, such Court can order that the father shall pay a sum not exceeding five shillings a week till the child attains sixteen or dies previously.⁶ The father's bankruptcy does not determine his liability under the order.⁴ As to the custody of the child, see *post*, p. 435; as to liability under the Poor Law, see *post*, pp. 447, 448; as to a bastardy order against a clergyman, see pp. 429, 430.

¹ See Clerk and Lindsell on Torts, pp. 158-162; Roscoe's *Nisi Prius*, Evidence; and *Evans v. Walton* (1867), L. R., 2 C. P., 615; *Terry v. Hutchinson* (1868), L. R., 3 Q. B., 599; *Hedges v. Tagg* (1872), L. R., 7 Ex., 283; *Appleby v. Franklin* (1885), 17 Q. B. D., 93. The plaintiff can declare either in case or in trespass; *Chamberlain v. Hazelwood* (1839), 7 Dowl., 816; for pleadings, see Bullen and Leake, 4th ed., vol. i., p. 463; tit. Master and Servant, vol. ii., p. 423. See Rules of Supreme Court, App. A, pt. iii., sec. iv., Indorsements of Writ; App. C, sec. vi., No. 9, Statements of Claim; App. D, sec. 6, Defences.

² R. S. C., Ord. 36, r. 2. ³ Mayne on Damages, 4th ed., pp. 461-464.

⁴ 53 & 54 Vict., c. 71, s. 10.

⁵ The number of illegitimate births registered in 1890 was 38,412, and in the proportion of 46 to 1000. See Reg. Gen.'s Report, p. ix.

⁶ 7 & 8 Vict., c. 101; 8 Vict., c. 10; 35 & 36 Vict., c. 65; 36 & 37 Vict., c. 9; and see Fisher's Digest, tit. Bastard; L. R. Digest, Current Index; and Stone Justice's Manual, tit. Bastardy; and Saunders on Affiliation. As corroboration, see *M'Kinven v. M'Miller* (Jan. 13, 1892), 19 R. 369, and *ante*, pp. 411, 412.

CHAPTER XIII

EFFECT OF NULLITY, DIVORCE, ETC.

<p>1. Decree of Nullity, 416</p> <p>2. Void Marriage, 417</p> <p>3. Decree Absolute for Dissolution, 420</p> <p> (a) <i>Cessation of Coverture</i>, 420</p> <p> (b) <i>Remarriage of divorced Persons</i>, 421</p> <p>4. Decree <i>nisi</i> for Dissolution, 422</p>	<p>5. Separation, Protection Order, etc., 424</p> <p> (a) <i>Judicial and Magisterial Separation</i>, 424</p> <p> (b) <i>Protection Order</i>, 425</p> <p>6. Divorce <i>a mensa et thoro</i>, 426</p> <p>7. Adultery and other Misconduct, 427</p> <p>8. Ecclesiastical Punishments, 429</p>
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SEC. 1.—DECREE OF NULLITY

THE effect of a decree of nullity, which was the only divorce *a vinculo* that the old Ecclesiastical Courts could pronounce, was that the parties ceased to be husband and wife.¹ If the marriage is declared null, there is no dower² or curtesy, and the husband's life interest in his wife's lands determines.³ Still, if the husband has, prior to the decree, done acts, these, being executed, shall stand good, such as receipt of rent, alienation of personality;⁴ but such wife can set aside the husband's leases of her land and enter thereupon.⁵

¹ See Chaps. V, VI. The decree may have the incidental effect of validating a subsequent marriage, see *ante*, pp. 34, 220, 235.

² Co. Lit., 32a.

³ *Ib.*, 235a; this includes land given in frank marriage, which shall revert to the wife in estate tail; see 2 Dy., 147b; *Webbe and Potter* case (1583), Godb., 18.

⁴ Brook, N. C., 32 Hen. VIII, and pp. 54 and 63; *Oland's* case (1602), 5 Co. Rep., 116b. ⁵ *Greeneley's* case (1610), 8 Co. Rep., 71b, 73a.

If land is given in tail to a man and his wife, and the heirs of their bodies, and their marriage is declared null, each takes a freehold, for the law will not expect a re-marriage.¹

Also, as to goods, if a wife is divorced *a vinculo*, she shall have back any goods which were given by her father in marriage with her and are undisposed of.² Also, where the wife was divorced, and appealed from the sentence, and meanwhile died; her husband, administering her goods, was sued as executor *de son tort*.³

The husband thereby ceases to be liable for his wife's debts contracted antecedent to the decree; for if a wife becomes single by operation of law, it is the same as if she had always remained single.⁴

As to testamentary bequests, where a testator left a legacy to his wife "as long as she should continue his widow and unmarried," and subsequent to the date of the will she obtained a decree of nullity for the testator's impotence, and he then died leaving her surviving, she was held not entitled to the legacy as above given.⁵

SEC. 2.—VOID MARRIAGE⁶

There is a distinction between void and voidable marriages. A voidable marriage is good and valid till a decree of nullity has been pronounced (see pp. 204, 212, 222); a void marriage requires no sentence, but may, at any time, in any proceeding, or merely by the act of the party, be treated as invalid. So a bigamous marriage is void *ab initio*

¹ *Lampet's case* (1613), 10 Co. Rep., 46a, 50b.

² *Anon* (1537), 1 Dy., 13a.

³ *Fleier v. Southcot* (1554), 2 Dy., 105b.

⁴ *Anstey v. Mannors* (1818), Gow, 10.

⁵ *In re Boddington* (1884), 25 Ch. D., 685, C. A.

⁶ And see s. 1, *supra*, Decree of Nullity.

by Spiritual as well as Common Law, and they are not husband and wife *de facto*.¹ As to what marriages are void or voidable, see *ante*, Chaps. II, V, and VI; but it may be said that now there are only two grounds of nullity by which a marriage is voidable, not void, *i.e.*, impotence or force (see pp. 23–28, 222). So where, in defence to an action on a covenant made in consideration of marriage, the defendant pleaded that the marriage was null and void by reason of impotence, without stating that it had been avoided by the sentence of any Court, or that either of the parties had elected to treat it as void, it was held a bad plea.² Although formerly there were other grounds of nullity, *e.g.*, pre-contract, and relationship, which made a marriage voidable, yet now all other grounds except impotence and force render a marriage absolutely void. So a marriage void under Lord Lyndhurst's Act, because contracted by the testator with his deceased wife's sister,³ does not, although there had been no decree of nullity, revoke a previous will;⁴ and probate of the will of a woman who went through such a marriage will be granted as of a "spinster."⁵

As to the validity of a settlement on a void marriage with a deceased wife's sister, the cases are conflicting; but it seems that where the settlement is expressed to be made in consideration of the marriage, such settlement is invalid, and may be set aside.⁶

¹ *Riddlesden v. Wogan* (1602), Cro. Eliz., 858.

² *Cavell v. Prince* (1866), L. R., 1 Ex., 246.

³ See Chap. II, pp. 30–32.

⁴ *Re Smith* (1853), 1 Spinks, Ecc. & Ad., 105.

⁵ *Re Dixson* (1855), 2 Spinks, Ecc. & Ad., 205; and see *Southall v. Jones* (1859), 1 Sw. & Tr., 298.

⁶ *Pawson v. Brown* (1879), 13 Ch. D., 202; *Ayeist v. Jenkins* (1873), L. R., 16 Eq., 275; *Chapman v. Bradley* (1863), 33 Beav., 61, 4 De G.,

A woman who had gone through the ceremony of marriage with her deceased sister's husband may take benefits under his will under a bequest to the "wife," this being *designatio personæ*.¹ Also where a woman, believing herself to be a widow, married the testator, she took a bequest by him to her as his wife.² Also, where a divorced woman had remarried before the limited time, she took under a power in a settlement as a wife.³ If a married woman remarries bigamously, and makes a settlement on such marriage, her real first husband's marital rights will prevail against such settlement.⁴

In case there is no settlement, the property remains vested in either spouse free of any marital right; but if the supposed wife has countenanced her supposed husband, selling the goods to a stranger, she and the stranger believing the marriage valid, it seems doubtful whether she could recover back her goods from such stranger.⁵

If the marriage is void, the parties can give evidence against one another,⁶ just as a kept mistress can give evidence against her paramour;⁷ still, if a woman believes that she is married to the prisoner, she may be, if not acquitted, yet discharged without punishment, when

J. & S., 71; *Coulson v. Allison* (1866), 2 Giff., 279; *Ford v. De Pontes* (1861), 30 Beav., 572; and see *Thompson v. Thomas* (1891), 27 L. R. Ir., 451.

¹ *Pratt v. Mathew* (1856), 22 Beav., 328.

² *Petts in re* (1859), 27 Beav., 576.

³ *Dolby v. Powell* (1862), 30 Beav., 534; as to marriage on decree nisi, see pp. 422-424.

⁴ *Algar v. Blethyn* (1835), 2 C. M. & R., 699. If the money was the wife's separate property (see Chap. IV, p. 188), she might, of course, do what she pleased with it.

⁵ *Waller v. Drakeford* (1853), 1 E. & B., 749.

⁶ *Wells v. Fletcher* (1831), 5 C. & P., 12; *R. v. Young* (1851), 5 Cox C. C., 296. As in bigamy, the second spouse is an admissible witness for or against the prisoner; see book on Evidence, and *post*, p. 477.

⁷ *Bathews v. Galindo* (1828), 4 Bing., 610.

indicted for consorting, harbouring, and assisting the prisoner, her supposed husband.¹

SEC. 3.—DECREE ABSOLUTE FOR DISSOLUTION

(a) *Cessation of Coverture*

A divorced woman, whether she has been petitioner or respondent, keeps her name acquired by marriage until she acquires another by repute.²

As regards one another, the parties cease to be husband and wife as soon as the decree is made absolute. The divorce does not make the marriage void *ab initio*, it merely terminates the relations of husband and wife from the time of divorce.³ Therefore, the wife cannot after the divorce sue the husband for an assault committed during coverture, for then they were one person.³ Also the former husband cannot be sued for his former wife's torts, if the action was commenced after, although the injury was committed previous to the decree for dissolution.⁴

The husband's marital rights to property cease, and therefore if a reversionary interest of the wife's, untouched by any settlement, falls into possession after the decree, she is absolutely entitled to it free from his marital rights.⁵ Also the wife forfeits her right to dower even although the decree was obtained on her own petition on account of her husband's cruelty and adultery.⁶ As to

¹ *R. v. Good* (1842), 1 C. & K., 185; and see *R. v. Hassall* (1826), 2 C. & P., 434.

² *Fendal v. Goldsmid* (1877), 2 P. D., 263; and see *re Hay* (1865), L. R., 1 P. & M., 51.

³ *Phillips v. Barnett* (1876), 1 Q. B. D., 436.

⁴ *Capel v. Powell* (1864), 17 C. B., N. S., 743.

⁵ *Wilkinson v. Gibson* (1867), L. R., 4 Eq., 162; *Wells v. Malbon* (1862), 31 Beav., 48; *Heath v. Lewis* (1864), 4 Giff., 665; *Prole v. Soady* (1868), L. R., 3 Ch., 220.

⁶ *Frampton v. Stephens* (1882), 21 Ch. D., 164; as to the husband's curtesy, see pp. 185, 186, 416, 428.

settlements, neither a decree for dissolution nor adultery by itself invalidates a marriage settlement, and the guilty party does not forfeit his or her rights thereunder,¹ and even a covenant for the settlement of after acquired property coming to either party during the coverture continues.²

As to testamentary bequests; on a devise of land to a husband and wife for life, and then to their children, and subsequent to the testator's death the wife is divorced for her adultery, here the husband took the whole annuity;³ also where a testator made a bequest to his son for life, and after his decease to any wife of his son during her life, and the son married a woman whom, on his own petition, he subsequently divorced, and he died without having married again; it was held that the divorced wife was not entitled to the bequest.⁴

In probate and administration, a wife who has been divorced for her adultery has no right to be appointed administratrix.⁵

(b) *Remarriage of Divorced Persons*⁶

On the decree absolute being pronounced, it is lawful

¹ *Evans v. Carrington* (1860), 2 D. F. & J., 481, App.; *Fitzgerald v. Chapman* (1875), 1 Ch. D., 563; *Burton v. Sturgeon* (1876), 2 Ch. D., 318, C. A.; as to power of the Probate and Divorce Division to vary, see *ante*, Chap. XI, p. 396.

² *Hamilton v. H.* (1892), 1 Ch., 396, pp. 403, 404.

³ *Knox v. Wells* (1864), 2 H. & M., 674.

⁴ *In re Morrieson* (1888), 40 Ch. D., 30, disapproving *Bullmore v. Wynter* (1883), 22 Ch. D., 619; and see *N. v. M.* (1885), 1 Times Reports, 523; the *ratio decidendi* in *in re Morrison* was that the son might have married again another wife who would have been unquestionably entitled. If the son had died before the decree absolute, the divorced wife would have been entitled; see *Stanhope v. S.* (1886), 11 P. D., 103, C. A.

⁵ *Re Nares* (1888), 13 P. D., 35.

⁶ As to Theology on the marriage of divorced persons, see *post*, Appendix 2, pp. 577-590.

for either party to marry again as if the prior marriage had been dissolved by death.¹

But "no clergyman in holy orders of the Church of England or Ireland shall be compelled to solemnise the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnising or refusing to solemnise the marriage of any such person : provided always, that when any minister of any church or chapel of the United Church of England or Ireland shall refuse to perform such marriage service between any persons who, but for such refusal, would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in holy orders of the said United Church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel."²

This section only permits a clergyman to refuse the *guilty* respondent; the petitioner who has succeeded in having his marriage dissolved has the same right as any other unmarried person to compel a clergyman to solemnise his or her marriage. The section does not exempt the clergyman from remarrying the successful petitioner.³

SEC. 4.—DEGREE NISI FOR DISSOLUTION

A decree *nisi* does not put an end to the marriage; the legal status of husband and wife continues, and the

¹ See 20 & 21 Vict., c. 85, s. 57, and 31 & 32 Vict., c. 77, s. 4. Originally the remarriage was postponed till after the time for appealing had expired; see *Chichester v. Mure* (1863), 3 Sw. & Tr., 223; *Rogers v. Halmshaw* (1864), 3 Sw. & Tr., 509; but now the decree being *nisi*, and the appeal being from the decree *nisi*, see *ante*, p. 242, the result is that immediately on the decree absolute, either parties can remarry; as to remarriage on decree *nisi* before decree absolute, see *post*, p. 423.

² 20 & 21 Vict., c. 85, ss. 57, 58.

³ As to compelling a clergyman to solemnise, see Chap. II, pp. 58, 59, Chap. XV, p. 471, s. 1 (a); as to the practice of the Church of England in remarrying the guilty respondent, see *post*, Appendix 2.

woman is subject to coverture.¹ So if one of the spouses remarried before the decree was made absolute, the second marriage is void ;² also sexual intercourse meanwhile by one of the spouses with a stranger is adultery,³ but intercourse between the husband and wife is not adultery,⁴ but will amount to condonation.⁵ Still as between the parties the *lis* is at end.⁶

As regards property, if the decree *nisi* is subsequently made absolute, and the decree absolute reflects back on the decree *nisi* in such a manner that when pronounced its effect on the subject then in question was the same as if it had been pronounced at the time when the decree *nisi* was made ; and, consequently, anything done in the interval was subject to the danger of being set aside by the decree being made absolute. And in that case an attempt by the husband's creditor to get possession of the wife's property by obtaining a stop-order on it between the decree *nisi* and absolute was declared ineffectual, and the wife entitled to the fund unencumbered.⁷ If, however, the decree *nisi* is not made absolute, as, *e.g.*, because the petitioner dies, the respondent continues to be the wife,

¹ *Ellis v. E.* (1883), 8 P. D., 188, C. A. ; *Norman v. Villiers* (1877), 2 Ex. D., 359, C. A.

² *Chichester v. Mure* (1863), 3 Sw. & Tr., 223 ; *Noble v. N.* (1869), L. R., 1 P. & M., 691 ; *Wickham v. W.* (1880), 6 P. D., 11 ; and see *De Thoren v. The Attorney-General* (1876), 1 App. Ca., 686, of which the facts are given, *post*, Chap. XVIII, s. 2 (c) ; formerly there was a further time beyond the decree *nisi*, during which it was forbidden to remarry ; see *ante*, p. 422, n. 1.

³ *Hulse v. H.* (1871), L. R., 2 P. & M., 259.

⁴ *Moore v. M.* (1892), the Times, July 16, p. 16 ; but like other condonation, it is subject to revival, *ib.* ; and see pp. 272-282, 426.

⁵ See *ante*, Chap. VII, p. 272 ; the petition will be dismissed.

⁶ *Latham v. L.* (1861), 2 Sw. & Tr., 299 ; *Ousey v. O.* (1875), 1 P. D., 56 ; *Midwinter v. M.* (1892), P., 28, p. 35.

⁷ *Prole v. Soady* (1868), L. R., 3 Ch., 220, observed in *Hulse v. H.*, *ubi sup.*

and, as in this case, will take a bequest by the petitioner's father to his son's "wife."¹

SEC. 5.—SEPARATION AND PROTECTION ORDER, ETC.

(a) *Judicial and Magisterial Separation*²

In every case of judicial separation the wife shall, from the date of the sentence, and while the separation continues, be considered as a *feme sole* with regard to her property, both as to acquiring it and disposing of it while alive, or when dead by her will; and she has the full powers of a *feme sole* as to contracting, suing, and being sued; and the husband shall not be liable for her torts and contracts, except he fails to pay alimony; in which case she can pledge his credit (see *ante*, p. 179). If the wife again cohabits with her husband, she shall thereafter be entitled, for her separate use, to all property to which she was entitled when the cohabitation was renewed.³ A decree for judicial separation has the same force as the divorce *a mensa et thoro* previously given by the Ecclesiastical Courts.⁴

As to property, the wife is entitled to personalty subsequently accruing, and unaffected by any settlements, as her absolute property, and free from the husband's or his creditors' rights.⁵

¹ *Stanhope v. S.*, *ubi sup.*

² See Chap. VIII, p. 352; a separation order has the same effect as a judicial separation, Chap. IX, s. 3, p. 366.

³ 20 & 21 Vict., c. 85, ss. 25, 26; and see *Nicol v. N.* (1886), 31 Ch. D., 524, C. A.; but now a married woman has during cohabitation many of these privileges under the Married Women's Property Acts; see *ante*, Chap. IV, p. 188.

⁴ *Ib.*, s. 7; as to cases decided in decree *a mensa et thoro*, see *post*, p. 426.

⁵ *Johnson v. Lander* (1869), L. R., 7 Eq., 229; *in re Insole* (1865), L. R., 1 Eq., 470.

In probate and administration, a wife who for her husband's fault has obtained a judicial separation is not, it would seem, thereby disentitled to have granted to her administration of his effects on his death.¹

(b) *Protection Order*

The effect of such order is that a wife's earnings and property acquired since the desertion belong to her as a *feme sole* for her separate use, free from her husband's marital rights ; and she can sue and be sued as if she had obtained a decree of judicial separation.²

Therefore, if a reversionary interest of the wife, untouched by any settlement, and not reduced into possession, accrues to her since the desertion, the wife will be absolutely entitled to it.³

The order is retrospective, going back to the commencement of the desertion ; therefore she had a right to property acquired before the protection order, but during the desertion ; and a will so made disposing of property so acquired is valid, and entitled to probate.⁴ For the order gives the wife power to make a will, where she otherwise would not be entitled.⁵ If, however, the protection order was improperly obtained, the husband can

¹ *Ihler, in re* (1873), L. R., 3 P. & M., 50.

² 20 & 21 Vict., c. 85, s. 21 ; the causes for obtaining such order are explained *ante*, Chaps. VIII and IX, pp. 358, 361 ; the subsequent provisions of the Married Women's Property Act, 1882, giving every wife separate property (see *ante*, Chap. IV, p. 188), render a protection order comparatively useless (see Chap. IX, pp. 362, 363).

³ *Nicholson v. Drury Company* (1877), 7 Ch. D., 48 ; *Ewart v. Chubb* (1875), L. R., 20 Eq., 454 ; *Coward and Adam's Purchase*, *ib.*, 179 ; *Kingsley's Trusts* (1858), 26 Beav., 84 ; *Cooke v. Fuller*, *ib.*, 99.

⁴ *Goods of Ann Elliott* (1871), L. R., 2 P. & M., 274 ; but as to right of suing, the order is not retrospective, *Midland Railway Co. v. Pye* (1861), 10 C. B., N. S., 179.

⁵ See Manual in this series on Wills and Intestate Succession, by J. Williams.

apply, even after the wife's death, to have it discharged ; whereon the will becomes invalid, and the husband can obtain revocation of probate.¹

If the wife dies intestate, the husband is not entitled to administer of her goods, and the children's guardian will be appointed.²

An adverse result of the protection order is that the wife becomes disentitled to pledge the husband's credit for necessities.³

SEC. 6.—DIVORCE A MENSA ET THORO

A divorce *a mensa et thoro* did not destroy the relation of husband and wife ; if either party married again, such party was guilty of bigamy ;⁴ and sexual intercourse by either with a stranger was adultery.⁵ If husband and wife, subsequent to the decree of divorce, became reconciled and cohabited, no remarriage was necessary, and the cohabitation amounted to condonation ;⁶ but till such reconciliation is proved, the divorce is presumed to continue.⁷

She was still a *feme covert*, and could not be sued as a *feme sole*.⁸

On a divorce *a mensa et thoro*, the ordinary legal pre-

¹ *Mahoney v. M'Carthy* (1892), P., 21 ; *Mudge v. Adams*, 6 P. D., 54 ; and see *ante*, Chaps. VIII and IX, as to discharging order, pp. 359, 364.

² Goods of *Stephenson* (1866), L. R., 1 P. & M., 287 ; Goods of *Weir*, (1862), 2 Sw. & Tr., 451.

³ *Tempany v. Hakewill* (1858), 1 F. & F., 438.

⁴ *Porter's case* (1637), Cro. Car., 461.

⁵ *Lautour v. The Queen's Proctor* (1864), 10 H. L. C., 685 ; *Ritchie v. R.* (1861), 4 Macq., 162.

⁶ *Seller v. S.* (1859), 1 Sw. & Tr., 482 ; *Stephens v. Totty* (1603), Cro. Eliz., 908.

⁷ *Underhill v. Brooke* (1595), Cro. Eliz., 352.

⁸ *Lewis v. Lee* (1824), 3 B. & C., 291 ; and see *Chambers v. Donaldson* (1808), 9 East, 471.

sumption that wife's domicile is the same as the husband's fails.¹

As regards probate and grant of administration, if the husband has obtained a divorce from his wife for her adultery, on his death the next of kin will be preferred to the widow.² Also where a wife, who has been divorced for her own adultery, is next of kin to an intestate, the administrator was ordered to pay to the husband direct, without requiring the divorced wife's concurrence.³ The husband of a divorced wife could give a good release to the executor for his wife's legacy.⁴

As to dower being lost by elopement in adultery, see *infra*.

SEC. 7.—ADULTERY AND OTHER MISCONDUCT

Adultery, even though established by a verdict, does not put an end to the relation of husband and wife.⁵

As to dower,⁶ in 1285 it was enacted by the Statute of Westminster the Second that a woman eloping with an adulterer is barred of her dower unless the husband willingly condone the adultery and cohabit again with her;⁷ and this is so even though the adultery was brought about by her husband's gross misconduct.⁸ No miscon-

¹ *Williams v. Dormer* (1852), 2 Rob. Ec., 505; and see *ante*, Chap. IV, pp. 165, 166.

² *Re Jones Davies* (1840), 2 Curt., 628; *Pettifer v. James* (1717), Bunb., 16; and see *Williams on Executors*, 8th ed., vol. i., p. 424.

³ *Cook v. Couper* (1758), 2 Lee, 504.

⁴ *Stephens v. Totty* (1603), Cro. Eliz., 908; this would only hold if the legacy was not the wife's separate property by settlement or under the Married Women's Property Act, 1882.

⁵ *Needham v. Bremner* (1866), L. R., 1 C. P., 583.

⁶ As to what is dower or free bench, see *Manual on Real Property*, by A. R. Rudall and C. Slagg; and on Wills and Succession, by J. Williams.

⁷ 13 Ed. I, c. 34, still in force; see *Revised Statutes*, vol. i.

⁸ *Bostock v. Smith* (1864), 34 Beav., 57; and see *Hethrington v.*

duct during widowhood or remarriage forfeits dower ; but as to free bench,¹ in some manors there is a custom that it lasts only during chaste viduity and is lost on unchastity.²

But a husband eloping does not forfeit his estate by the curtesy.³

As to settlements and the wife jointure, her adultery does not forfeit her right thereunder or relieve her husband from his covenants,⁴ in fact, it has no effect on it whatever, and husband and wife retain their previous rights thereunder unaltered,⁵ unless it is varied by the

Graham (1829), 6 Bing., 135 ; *Woodward v. Dowse* (1861), 10 C. B., N. S., 722 ; *Hawarth v. Herbert* (1554), 2 Dy., 106*b* ; but a divorce without elopement does not forfeit dower, *Lady Stowell* (1605), Godb., 145 ; dower is also forfeited by a decree for dissolution of marriage (see *ante*, p. 420).

¹ See note 6, *supra*.

² *Doe on the demise of Askew v. A.* (1809), 10 East, 520 ; and see a humorous account of such a custom in the manor of East and West Euborne, Berks, given in the *Spectator*, Nos. 614, 623, whereby the free bench was restored, notwithstanding unchastity, if the widow rode into Court on a black ram, saying these words—

“ Here I am,
Riding upon a black ram,
Like a whore that I am ;
And for my crincum crancum,
Have lost my bincum bancum ;
And for my tail's gain
Have done this worldly shame ;
Therefore I pray you, Mr. Steward, let me
have my land again.”

A similar custom prevails in the manors of Chadleworth in Berks, and of Torre in Devonshire. Cruise's Digest of the Law of Real Property, tit. Copyhold.

³ *Sidney v. S.* (1734), 3 P. Wms., 269 ; and as to curtesy, see pp. 185, 186, 416.

⁴ *Sidney v. S.* (1734), 3 P. Wms., 269 ; *Buchanan v. B.* (1809), 1 Ball & B., 203 ; *Jee v. Thurlow* (1824), 2 B. & C., 547 ; *Doneraile v. D.* (1734), 1 Coop. t. Cot., 534 ; and see *ante*, p. 421.

⁵ *Evans v. Carrington* (1860), 2 D. F. & J., 481 ; *Fearon v. Aylesford, Earl of*, (1884), 14 Q. B. D., 792, C. A.

Probate and Divorce Division under their statutory power; see Chap. XI, p. 396.

But adultery by a wife usually forfeits her equity to a settlement as to all money coming to her husband in right of his wife;¹ and *è converso* if the husband is divorced for his adultery, the wife will have the whole fund settled on her in opposition to his marital right.²

Adultery by the wife also prevents her from pledging the husband's credit if she elopes from the house or is expelled by the husband, but not if she continues to cohabit with him.³

When the wife possessed lands or reversionary interest in personal property, and the husband was separated from his wife by mutual consent or under a divorce *a mensa et thoro*, or under a sentence of transportation, the Court could dispense with the husband's concurrence and allow her to alienate such property by her own act.⁴

SEC. 8.—ECCLESIASTICAL PUNISHMENTS

Adultery and immorality has always been and still is punishable in the Ecclesiastical Courts, whether committed by persons in holy orders or laymen; see *ante*, pp. 10, 32, 231, 310, 311, 350.

¹ See *Moore v. M.* (1737), 1 Atk., 272; *Watkins v. W.* (1740), 2 Atk., 96; *Lee v. L.* (1758), Dick, 321, 806; *Greedy v. Lavender* (1850), 13 Beav., 62; *Barrow v. B.* (1854), 18 Beav., 529; *Lewin's Trust* (1855), 20 Beav., 378; *Watts v. Shrimpton* (1855), 21 Beav., 97, and see p. 186.

² *Barrow v. B.* (1854), 5 De G. M. & G., 782; and see *Head v. H.* (1745), 3 Atk., 293, 547; *Gilchrist v. Cator* (1847), 1 De G. & S., 188.

³ See *ante*, Chap. IV, pp. 179, 181; and see *Wilson v. Glossop* (1888), 20 Q. B. D., 354, C. A.

⁴ 3 & 4 Will. IV, c. 74, s. 91; 20 & 21 Vict., c. 57; and see *re Rogers* (1865), L. R., 1 C. P., 47; *Andrews* (1865), 19 C. B., N. S., 371; *ex parte Martha Robinson* (1869), L. R., 4 C. P., 205; and see cases noted on the statutes.

As to clergymen (exclusive of bishops), the Clergy Discipline Act, 1892, provides, if either a bastardy order is made on a clergyman, or a clergyman is found in a divorce or matrimonial cause to have committed adultery, or an order for judicial separation is made against a clergyman in a divorce or matrimonial cause (see *ante*, Chap. VIII, p. 352), or a separation order is made against a clergyman under the Matrimonial Causes Act, 1878 (see *ante*, Chap. IX, p. 364), then, after the date at which the order or finding becomes conclusive, the preferment (if any) held by him shall within twenty-one days without further trial be declared by the bishop to be vacant as from the said date, and he shall be incapable, save as in this Act mentioned, of holding preferment.¹

Also immorality is a ground of complaint for which, under and in accordance with that Act, a clergyman may be deprived or suspended.²

But a protection or maintenance order (see *ante*, pp. 358, 361, 368), or an order for restitution of conjugal rights or jactitation (see Chap. X), made against a clergyman, are not offences under the Clergy Discipline Act, 1892.

Convocation has made a Canon which has received the Royal Assent by Letters of Business regulating ecclesiastical procedure under the Act.

¹ 55 & 56 Vict., c. 32, s. 1, and see F. H. L. Errington's Clergy Discipline Act, 1892, with rules, etc.

² *Ib.*, s. 2 and seq.

CHAPTER XIV

INFANCY¹

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¹ See Simpson on Infancy, 2nd ed., 1890 ; Eversley's Domestic Relations, 1885 ; Schouler's Domestic Relations (Amer.), 1870.

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SEC. 1.—POWERS OF PARENT

(a) *Father and Mother of Legitimate Child*

Custody.—The father, where he has not waived or forfeited it (see (c), p. 435), has an absolute right to the custody of his children, even as against the mother; and he can remove an infant at breast from the mother, and take it abroad; and if he denies the mother access to the child, the Court has no jurisdiction to enforce it.¹

The father can enforce his rights to the person of his child by *habeas corpus*; and its delivery to the father

¹ *R. v. De Manneville* (1804), 5 East, 221. An application was subsequently made to the Court of Chancery, when Lord Eldon restrained the father from removing it from the jurisdiction, but refused to divest the father of the custody and deliver it to the mother; *De Manneville v. De M.* (1804), 10 Vesey, 52; *Re Hakewill* (1852), 12 C. B., 223; *Hope v. H.* (1854), 2 Eq. Rep., 1047; and see *re Agar Ellis* (1883), 24 Ch. D., 317, C. A.; but by 36 & 37 Vict., c. 12, the Court can order that the mother of a child under sixteen shall have access to it; and see *in re Taylor* (1876), 4 Ch. D., 157; but this power seems never to have been exercised, except in cases of the father's misconduct, as to which see *post*, p. 436.

under an order of the Court may be effected by the "Sergeant-at-Arms attending the Court."¹

Religion.—The father has an absolute right to determine the religion in which his child shall be brought up, notwithstanding any promise he may have made previous to marriage or at any other time, as to the bringing up of the children.²

Education.—The father can also select a school or tutor for his child; and it is by delegation of the father's authority that the schoolmaster has a right to chastise the child.³

Chastisement.—A parent may chastise his child in a reasonable manner,⁴ and this right is expressly saved by the Prevention of Cruelty to and Protection of Children Act, 1889.⁵ But where, in exercise of this right of chastisement, Mrs. Montagu, a lady of position, had killed her little daughter, by having tied her up in a locked dark cupboard for five hours, the mother was convicted of manslaughter, and sentenced to twelve months' imprisonment.⁶

Services and Earnings.—A parent, it would appear, so long as the child remains at home, and is maintained by him, has a right to his services, and it is on this ground that a father has a good cause of action for the seduction of a daughter (see *ante*, Chap. XII, p. 414); but it seems

¹ *G. v. L.* (1891), 3 Ch., 126.

² *In re Agar Ellis* (1878), 10 Ch. D., 49, C. A.; *in re Scanlan* (1888), 40 Ch. D., 200; *in re Violet Nevill* (1891), 2 Ch., 299, C. A.; *Barnardo v. M'Hugh* (1891), 1 Q. B., 194, A. C., 388; *Alicia Ruce* (1857), 1 H. & M., 420, n.; see the previous stage in this case, *R. v. Clarke* (1857), 7 E. & B., 186; and see *post*, p. 454.

³ *Agar Ellis* (1882), Law Reports, 24 Ch. D., 317, C. A.; *Fitzgerald v. Northcote* (1865), 4 F. & F., 656; and see 52 & 53 Vict., c. 44, s. 14, reserving and recognising the teacher's right to chastise the child. See Manual on Education, by J. Williams, quoting *Hult v. Hayleybury*; and see *post*, pp. 449, 454.

⁴ Hawkins' Pleas of the Crown, tit. Surety of the Peace, sec. 23.

⁵ 52 & 53 Vict., c. 44, s. 14.

⁶ See the Times for April 5, 1892, p. 10.

doubtful whether he can take the child's earnings gained by service to a stranger, though this is the law in America.¹

Marriage.—The father's right to object or consent to his child's marriage has been previously discussed (see *ante*, p. 52); he has also an interest in having the child's marriage declared null and void (see *ante*, p. 229).

Further, he is the proper person to advise his daughter in all matters relating to the preparation and provisions of her marriage settlement.²

Property.—As to the property of his child, a father has no right to it; if he enters into possession of land, he will be regarded as the child's bailiff, and have to account for the rents and profits he has received;³ and as to personality, if he receives the income and, *a fortiori*, the capital, unless it be expressly given by the Court and by the trustee to him for maintenance, he will have to refund it;⁴ and his estate may be sued for such conversion after his death by the child.⁵

Mother's Rights.—As to the mother's rights, it will have already been made clear that during the husband's life she has none,⁶ except in case of such husband's misconduct; after the husband's death she is, by the Guardianship of Infants Act, 1886,⁷ a necessary guardian (as which see *post*, pp. 449, 450).

¹ Simpson on Infants, 2nd ed., p. 180; Schouler's Domestic Relations, p. 344; Parsons on Contracts, 6th ed., vol. i., p. 309.

² *Trucker v. Bennett* (1887), 38 Ch. D., 1, C. A.

³ *Thomas v. Thomas* (1855), 2 K. & J., 79; *Wall v. Stanwick* (1887), 34 Ch. D., 763; and see *in re Hobbs* (1887), 36, *ib.*, 553.

⁴ *Wilson v. Turner* (1883), 22 Ch. D., 521, C. A.

⁵ *Concha v. Murrieta* (1889), 40 Ch. D., 543, C. A.

⁶ See the discussion in Tristram Shandy, bk. ii., chaps. lxiv., lxv., whether a mother is akin to her son. For the theory that the father is nearer akin to the child than the mother, see Aeschilus, Eumenides, v. 661 and seq.; Euripides, Orestes, v. 552 and seq.; and Butler and Dindorf's notes.

⁷ 49 & 50 Vict., c. 27, s. 2.

(b) *Father and Mother of a Bastard*

A bastard child has no guardian, but—

“ It is now settled, after some fluctuation of opinion, that the mother of an illegitimate child has a *prima facie* right to the custody of the child up to the age of fourteen, in preference either to the reputed father or to any other person.”

And in determining who is to have the custody of and control over an illegitimate child, the Court will, in a proper case, give the same effect to the mother's wishes in respect of the care, maintenance, and education of the child as it gives to the wishes of the father of a legitimate child in those respects.¹

And in one case the Common Pleas, upon *habeas corpus*, ordered an illegitimate child to be delivered to the mother, although the father might be better able to educate and maintain it, and had undertaken to do so, and notwithstanding that their order might be of great prejudice to the child.²

But the Court has a control over the mother, and would deprive her of the custody for the like reason for which they would interfere with the paternal rights.¹

(c) *Forfeiture of Parental Rights by Misconduct or Waiver.*

Jurisdiction of the Court, etc.—The Court of Chancery, representing the Crown as *parens patriæ*, had peculiar original jurisdiction over infants to act for their benefit, and therein to control the right of the father to the custody.³

¹ *R. v. Barnardo* (Jones's case) (1891), 1 Q. B., 194, C. A.; but although the House of Lords (1891), A. C., 388, affirmed the Court of Appeal, it doubted whether the legal rights of the mother of a bastard were equivalent to those of the father of a legitimate child; and see *re Ullee* (1886), 53 L. T., 711, 54 *ib.*, 286, C. A.

² *Ex parte Ann Knee* (1804), 1 New Rep., 148.

³ See *post*, s. 3, pp. 450, 451.

This jurisdiction has been increased by successive statutes, beginning in 1839 with Serjeant Talfourd's Act, 2 & 3 Vict., c. 54,¹ giving the Court of Chancery an absolute discretionary power as to the custody of the infant, on the application of the mother, up to the age of seven; and this age was raised to sixteen by 36 Vict., c. 12, repealing and re-enacting Serjeant Talfourd's Act.

Under these Acts the Court was bound to consider the paternal right, the marital duty, and the interest of the children.²

And in an application to give over the custody to the mother under this Act, the Court acts on different principles, and grants it more readily than if it were to interfere with paternal rights, the mother not appearing.³

Further powers as to the custody of infants were conferred on the Courts by 49 & 50 Vict., c. 27, s. 5, and 54 & 55 Vict., c. 3, and by other statutes (see *post*, pp. 437-445), meeting special cases.

But even a Court of Common Law has had a discretion to refuse a *habeas corpus* to deliver the child to the father, if it would be to the great disadvantage of the child, as in a case where the father is living with a mistress in open immorality; and now Common Law Courts have concurrent jurisdiction with Courts of Equity, and in exercise of that jurisdiction the rules of equity are to prevail.⁴

As to how this jurisdiction will be exercised, the Court of Appeal lately laid down that the Court will not interfere with the father in the exercise of his paternal authority except where, by his gross moral turpitude, he

¹ *Ex parte Bartlett* (1846), 2 Coll. C. C., 661.

² See per Jessel, M. R., in *re Taylor* (1876), 4 Ch. D., 157; and see in *re Ethel Brown* (1884), 13 Q. B. D., 614; and see the judgment of the Privy Council, *Smart v. S.* (1892), the Times, Aug. 1, p. 9.

³ In *re Elderton* (1883), 25 Ch. D., 220.

⁴ In *re Goldsworthy* (1876), 2 Q. B. D., 75.

forfeits his rights, or where he has by his conduct abdicated his paternal authority, or where he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court ;¹ or, as was laid down in another case—

“The Court must be satisfied that the father has so conducted himself or placed himself in such a position as to render it, not merely better for the children, but essential to their safety or welfare in some very serious or important respect, that the father’s acknowledged rights should be interfered with ;—mere incontinence or habits of intemperance will not of itself justify the interference of the Court.”²

The misconduct may be actual moral misconduct or irreligious opinions.

Moral Misconduct and Cruelty.—As to the former, the leading case is Lord Eldon’s decision whereby he deprived Mr. Long Wellesley of the custody of his children on the ground that he was keeping up an adulterous connection, and had actually taught the children vicious and blasphemous habits.

And by the Criminal Law Amendment Act, 1885, where a father or mother has caused, encouraged, or favoured the seduction or prostitution of a girl under sixteen, the Court has power to divest such father or mother of all authority over her, and appoint any person willing to take charge of her to be her guardian until she has attained twenty-one.¹

And by the Prevention of Cruelty to and Protection of Children Act, 1889, where a person having the custody or control of a girl under sixteen or a boy under fourteen has been convicted under that Act of wilfully ill-treating,

¹ *In re Agar Ellis* (1883), 24 Ch. D., 317.

² *In re Goldsworthy* (1876), 2 Q. B. D., 75.

³ *Wellesley v. The Duke of Beaufort* (1827), 2 Russell ; aff. by the House of Lords, 2 Bligh, N. S., 124.

⁴ 48 & 49 Vict., c. 69, s. 12.

neglecting, abandoning or exposing, or causing the ill-treatment, etc., of such child in a manner likely to cause such child unnecessary suffering or injury to its health, or of any offence involving bodily injury to the child, and punishable with penal servitude, or bound over to keep the peace towards such child, any person may bring such child before a Petty Sessional Court; and the Court, if satisfied on inquiry that it is expedient so to deal with the child, may order that the child be taken out of the custody of such person and committed to the charge of a relation of the child, or other person being willing to undertake such charge, until it attains the age of fourteen years, or if a girl, sixteen years; and may order the parent to contribute to the maintenance of the child. But no order is to be made unless a parent of the child shall have been proved party or privy to the offence.¹ But the Act does not affect the right of parental chastisement.²

Further, the Custody of Children Act, 1891,³ provides—

“Where the parent of a child applies to the High Court or the Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may, in its discretion, refuse to issue the writ or make the order;” and “where a parent has abandoned or deserted his child, the Court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child.”

And by the Poor Law Act, 1889, it is provided—

“Where a child is maintained by the Guardians of the Union, and was deserted by its parents, or if the parent is imprisoned in respect of an offence committed against a child, the Guardians may at any time resolve that such child shall be under the control of the Guardians until

¹ 52 & 53 Vict., c. 44, ss. 1-5.

² *Ib.* s. 14; and see *ante* (a), p. 433.

³ 54 Vict., c. 3, ss. 1 and 3.

it reaches the age, if a boy, of sixteen, and if a girl, of eighteen years ; and thereupon until the child reaches that age all the powers and rights of such parent in respect of that child shall, subject as in this Act mentioned, vest in the Guardians.”¹

A Police Court may, however, upon proof that the child was not maintained by the Guardians and deserted by the parent, or it would be for the benefit of the child, divest the Guardians of the custody and return it to the parent.¹

But the religious education of the child is not to be changed or affected.¹

Atheistical and Immoral Principles.—By the original jurisdiction the Court of Chancery deprived a father of the custody of his children on the ground of his professing atheistical and immoral principles.

As in the well-known case of the poet Shelley, Lord Eldon, L. C., refused to deliver to Shelley the custody of his children, then living with the maternal grandfather, Westbrooke, Shelley having avowed himself an atheist, and written and published books in which he blasphemously derided the truth of the Christian revelation, and denied the existence of a God as the Creator of the universe ; and further deserted his wife and unlawfully cohabited with another woman. The Lord Chancellor after distinguishing cases in which the father's principles had not been called into activity or manifested in such reprehensible conduct in life, and cases in which those principles, though called into activity, nevertheless did not in the probable range and extent of their operation put to hazard the children's happiness and welfare, and insisted that Shelley's was a case where—

“The father's principles cannot be misunderstood, in which his conduct, which I cannot but consider as highly immoral, has been

¹ 52 & 53 Vict., c. 56, s. 1.

established in proof, and established as the effect of these principles ; conduct nevertheless which he represents to himself and others, not as conduct to be considered immoral, but to be recommended and observed in practice, and as worthy of approbation. I consider this, therefore, as a case in which the father has demonstrated that he must and does deem it to be matter of duty, which his principles impose upon him, to recommend to those whose opinions and habits he may take upon himself to form, that conduct in some of the most important relations of life, as moral and virtuous, which the law calls upon me to consider as immoral and vicious—conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously affecting both the interests of such persons and those of the community.”¹

And in the case of Mrs. Besant, wife of the Rev. Frank Besant, where a deed of separation had been executed, giving the custody of the daughter to the mother, but subsequent to such deed Mrs. Besant had published an atheistical book and delivered atheistical lectures, and further written and published a book called the “Fruits of Philosophy,” which a jury found to be calculated to deprave public morals, and other similar books which the Courts of Appeal considered disgusting to decent English men and women, as violations of morality, decency, and womanly propriety ; the Court of Appeal, while considering the first ground of atheistical belief sufficient to deprive Mrs. Besant of the custody, as by reason of this the child would be brought up, not in the father’s belief ; further, on the second ground, considered it their duty to the ward to prevent her, by being brought up with the mother, running the risk of being brought up in opposition to the views of mankind generally as to what is moral, decent, womanly, and proper ; and the Court, therefore, notwithstanding the separation deed, restored the custody to the father.²

And in a case where father and mother had been

¹ *Shelley v. Westbrooke* (1817), Jacob, 266.

² *In re Besant* (1879), 11 Ch. D., 508, 521, C. A.

members of the Agapemone, a religious sect localised in a large building near Weymouth, believing that the Day of Judgment had commenced, and that prayer was therefore unnecessary, and Sunday was the same as other days, and in pursuance therefore the society played hockey on Sunday, and where the mother, becoming pregnant and insubordinate, was expelled from the society but the husband remained a member, Kindersley, V. C., restrained the father from taking possession of the child.¹

Divorce.—Where there is a petition for judicial separation, restitution, nullity, or dissolution of marriage, the Court can make orders for the custody of children.²

Also under the Guardianship of Infants Act, 1886, the Court has power, when making a decree for judicial separation or divorce, to declare that the guilty parent is unfit to have the custody; and in such case such guilty parent shall not, on the death of other parent, be entitled as of right to the custody or guardianship of the children.³

Also under the Matrimonial Causes Act, 1878, where the husband has been convicted of an aggravated assault and the wife has obtained a separation order from the magistrate, the magistrate may further order—

“That the legal custody of any children of the marriage under the age of ten years shall, in the discretion of the Court or magistrate, be given to the wife.”⁴

Waiver by Separation Deed.—An antenuptial agreement between husband and wife as to the religion and custody of the children is void.⁵

¹ *Thomas v. Roberts* (1850), 3 De G. & S., 758.

² 20 & 21 Vict., c. 85, s. 35; see Chap. XI, p. 404.

³ 49 & 50 Vict., c. 27, s. 7; and see s. 13; and see *in re G.* (1892), 1 Ch., 292; and see Chap. XI, p. 404.

⁴ 41 Vict., c. 19, s. 4; and see pp. 364–368.

⁵ *Andrews v. Salt* (1873), L. R., 8 Ch., 622.

A post-nuptial agreement between husband and wife, usually contained in a separation deed whereby the father divested himself of the custody of the children and handed them over to the mother or some other person, was held to be void as contrary to public policy ; but just as separation deeds were by the development of law after long hesitation enforced (see *ante*, Chap. IV, p. 200), so now by express statute¹ it is provided—

“No agreement, contained in any separation deed made between the father and mother of an infant or infants, shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother : provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.”

So where in a separation deed between a Roman Catholic husband and a Protestant wife, it was agreed that the husband should not contribute to the support of the female infant, and the husband covenanted that the wife should have the absolute custody and control of the infant without any interference by him, it was held that the wife was entitled to the absolute control of the education (religious and otherwise) of the infant, notwithstanding the father desired the infant to be brought up in the Roman Catholic religion.²

But in default of any stipulation as to religion, the infant must be brought up in its father's religion ; so, where Mrs. Besant (for statement of case, see *ante*, p. 440) wished to bring up her daughter, who was under the provision of a separation deed in her custody, as an infidel, the father being a clergyman of the Church of England, the Court, acting to protect the father's right, and also in the interests of the infant on the ground

¹ 36 Vict., c. 12, s. 2.

² *Condon v. Follum*, W. N., 1887, p. 121.

that she ought not to be brought up an atheist, deprived the mother of the custody and restored it to the father notwithstanding the separation deed.¹ And the same course was followed in another case where the mother, who, under the provisions of a separation deed had custody of the child, took to immoderate drinking to such an extent as to incapacitate her for considerable periods of the day from exercising any control over herself or her actions.²

Waiver by Adoption.—An agreement by father or mother with a stranger to give up their parental rights is not binding and is revocable at pleasure,³ though the Custody of Children Act, 1891,⁴ enacts that—

“Where a parent has allowed his child to be brought up by another person, school, or institution, at the person’s, etc., expense, for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child.”

And further, in case the child, after being brought up by another person, is redelivered to the parents, the Court may, in its discretion, order such parents to repay the whole or part of the costs properly incurred bringing up such child.

Still, as the law stands, it is impossible to stipulate with a parent to adopt a child so as to obviate altogether the possibility of such parent reasserting his parental rights. Lord Meath introduced, in 1889 and 1890, a Bill to legalise the adoption of children, but owing to

¹ *In re Besant* (1879), L. R., 11 Ch. D., 508, C. A.

² *Carnegie’s case*, cited *in re Besant*, *ubi sup.*

³ See *R. v. Barnardo*, *Tye’s case* (1889), 23 Q. B. D., 305, C. A.; *id.*, *Gossage’s case* (1890), 24 Q. B. D., 283, C. A., H. L. (1892), W. N., 132; *id.*, *Jones’s case* (1891), 1 Q. B., 194, C. A., and A. C., 388.

⁴ 54 Vict., c. 3, ss. 3, 5.

the continued strenuous opposition of the Lord Chancellor, Lord Halsbury, arguing that to sanction such benevolent scheme of substituting a foster parent anxious to adopt for a real parent anxious to abdicate, was

‘Acting contrary to the cardinal principles of the law of England,’

this very useful measure, which had received the support of Protestants and Catholics, had to be withdrawn.¹

Waiver by Conduct.—Still, the Court of Chancery was in the habit, when a father had deliberately accepted a condition which was for the benefit of his children,—whereby another person had purchased the right of bringing them up, and the father for many years had acquiesced in the children obtaining these benefits, exceeding what they would have had if brought up with him,—of exercising its discretion by restraining him from taking possession of such infants.²

It may be said by a lay reader that the exercise of such jurisdiction seems to legalise adoption, which, as previously explained, is void and without legal effect. In answer to this it may be said, that such jurisdiction is entirely discretionary, and therefore no fixed rule can be laid down about it. But, in truth, this part of the law is anarchic, and in conflict with the habits of English folk, among whom, according to the ordinary experience of mankind, adoption frequently takes place, and it would seem to be the immediate duty of the Legislature to legalise such a custom.

Removing from the Jurisdiction.—If the child is a

¹ See Hansard's Parliamentary Debates, vol. cccxxxviii., pp. 502-514, vol. cccxliii., pp. 1385-1406.

² *Lyons v. Blenkin* (1821), Jacob, 245, the leading case on the subject, where Lord Eldon allowed children to remain with an aunt who for many years had maintained them; and see *re Ullce* (1886), 53 L. T., 711, 54 L. T., 286, C. A.

ward of Court the father has no right to remove it out of the jurisdiction, for there used to be a strict rule that a ward might not be taken out of jurisdiction without leave, such leave being only given in cases of necessity; but now leave may be given without a case of necessity being shown, the Court having only to be satisfied that the step is for the benefit of the ward, and that there is sufficient security that future orders will be obeyed.¹

SEC. 2.—DUTIES AND LIABILITIES OF PARENT

(a) *Care*

That “*a woman is the common carrier of her unborn child*” has very recently been laid down by an Irish judge;² but, apart from the criminal liability for abortion,³ it would seem difficult, as well as grotesque, to hold the parents liable in damages to the child when born, for acts done by them or for accidents occurring during the period of gestation. It is the moral duty of a mother to suckle her infant children unless some grave and lawful cause prevents her.⁴

It seems doubtful whether at Common Law there is any legal obligation on parents to take care of and protect their children; but the Prevention of Cruelty

¹ *In re Callaghan* (1884), 28 Ch. D., 186, C. A.

² Per O'Brien, J., in *Walker v. G. N. R.* (1891), 28 L. R. Ir., 69, p. 84; but the learned judge, in thus extending parental liabilities, falls short of the period to which Dr. Sterne would carry back the obligation by insisting on the mutual duty that is incumbent on father and mother of taking care that the homunculus is duly begotten; see Tristram Shandy, bk. i., chaps. i. to iii.

³ See 24 & 25 Vict., c. 100, ss. 58, 59.

⁴ Epitome of the Moral Theology of Benedict XIV, tit. *Mater*, selected by Mansi, Archbishop of Luca; bound up with Liguori, Moral Theology. But not in the presence of a stranger; see *ante*, pp. 319, 320.

to and Protection of Children Act, 1889, after repealing s. 37 of the Poor Law Amendment Act, 1868, by virtue of which several of the Peculiar People have been punished for not supplying medical attendance to their children, and convicted of manslaughter when the child died in consequence thereof,¹ enacts—

“Any person over sixteen years of age who, having the custody, control, or charge of a child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health, shall be guilty of a misdemeanour and punishable”²

by fine or imprisonment, or both, with power to increase the fine where the offender was interested in the death of the child.²

The same Act² further enacts, that—

“Any person who (a) Causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, to be in any street for the purpose of begging or receiving alms, or of inducing the giving of alms, whether under the pretence of singing, performing, or offering anything for sale, or otherwise; or

“(b) Causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, to be in any street, or in any premises licensed for the sale of any intoxicating liquor, other than premises licensed according to law for public entertainments, for the purpose of singing, playing, or performing for profit, or offering anything for sale, between ten P.M. and five A.M.; or

“(c) Causes or procures a child under the age of ten years to be at any time in any street, or in any premises licensed for the sale of any intoxicating liquor, or in premises licensed, according to law, for public entertainments, or in a circus or other place of public amusement to which the public are admitted by payment, for the purpose of singing, playing, or performing for profit, or offering anything for sale,—”

¹ 31 & 32 Vict., c. 122, s. 37; *R. v. Downes* (1875), 1 Q. B. D., 25; *R. v. Morby* (1882), 8 Q. B. D., 571.

² 52 & 53 Vict., c. 44, ss. 1, 3.

Shall, on conviction by a Court of Summary Jurisdiction, be liable to a fine not exceeding £25, or not more than three months' imprisonment, or both.¹ But the section provides that a Police Court may license the employment of a child over seven in a theatre, etc., where proper provision is made for the health and kind treatment of the child, and the child is fit to take part.

But, apart from the criminal liability under these Acts, it seems very doubtful whether a parent is under any civil liability to the child for negligence,² though for actual injuries inflicted by such parent he would be liable like any other tortfeasor.

(b) *Maintenance*

“It is now well established that, except under the operation of the Poor Law, there is no legal obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly, there is no such obligation.”³

By the Poor Laws, if a child becomes chargeable to the parish, going on the rates, its father and grandfather, and its widowed (if married, then only in case she has separate property) mother and grandmother might be compelled to contribute to its support, whatever the age of the child might be. As to bastard children, an unmarried woman is liable under the Poor Laws for the support of her bastard⁴ child till such child attains sixteen,

¹ 52 & 53 Vict., c. 44, s. 3.

² There is no actual case on this point, but the subject is most elaborately discussed in a recent learned work on Negligence, by Mr. T. Beven, pp. 154-156, where that text writer is considering how far the contributory negligence of the parent debars the child from recovering against the third party for any injury such child may have suffered.

³ Per Cockburn, C. J., in *Bazeley v. Forder* (1868), L. R., 3 Q. B., 559.

⁴ 43 Eliz., c. 2, s. 6; 4 & 5 Will. IV, c. 76, s. 56; 45 & 46 Vict., c. 75, s. 21.

or until the mother marries,¹ when her husband becomes liable to maintain his wife's bastards born previous to marriage.² The putative father of a bastard child may also be made to contribute to its support.³ But until the child became chargeable no such obligation arose.⁴

So where a very rich Jew had an only daughter who was converted from Judaism and became a Christian, whereon her father turned her out of doors, and refused to allow her any maintenance, and the Sessions made an order that the father should allow her 20s. a month; but the King's Bench quashed the order, because it was not alleged that she was poor, or likely to become chargeable to the parish.⁵

But where a child is living with and supported by its father, maintenance is frequently allowed to the father and always to the mother out of the infant's property by the Court.⁶ The cost of past maintenance is granted to the father more rarely and with greater difficulty. Trustees of infants' property have also power at their discretion to allow maintenance to an infant's parent.⁷

It is a clear principle of law that a father is not under any legal obligation to pay his son's debts.

"In point of law a father who gives no authority and enters into no contract, is no more liable for goods supplied to his son than a brother or an uncle, or a mere stranger would be. . . . If a father does any specific act, from which it may reasonably be inferred that he has authorised his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his

¹ 4 & 5 Will. IV, c. 76, s. 71.

² *Ib.*, s. 57.

³ 35 & 36 Vict., c. 65.

⁴ *Peters v. Cowie* (1877), 2 Q. B. D., 131.

⁵ *St. Andrews Undershaft v. Jacob Mendez de Breta* (1702), 1 Lord Raymond, 699.

⁶ *Havelock v. H.* (1881), 17 Ch. D., 807.

⁷ Conveyancing Act, 1881, 44 & 45 Vict., c. 41, s. 43; see *post*, p. 455, where the section is quoted.

debts; and," said Lord Abinger, C. B., "one ought not to put upon his acts an interpretation which abstractedly and without reference to that moral obligation, they will not reasonably warrant."¹

However, in certain cases where father and mother are living separate and the children are with the mother, it has been held that the mother has implied authority to pledge the father's credit for necessaries.²

As to power of Divorce Court to order maintenance for children, see pp. 404-408.

(c) *Education*

Neither is there any legal obligation on a father to educate his children² except under the Elementary Education Acts, 1870 to 1891. The Act of 1876 enacts, "It shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic."³

SEC. 3.—OFFICE, POWERS, AND DUTIES OF GUARDIANS

(a) *Appointment of Guardians*

Appointment by Father.—By 12 Car. II, c. 24, passed on the abolition of feudal tenures, which had previously provided for the wardship of infants, power was given by ss. 8, 9 to a father to appoint by will or deed, but not verbally, a guardian for all his children, including posthumous children, being under twenty-one and not married.

Previous to the Guardianship of Infants Act, 1886, the father only, and not the mother, could appoint a guardian; and such testamentary guardians appointed by the father

¹ Per Lord Abinger, C. B., and Parker, B., *in re Mortimore v. Wright* (1840), 6 M. & W., 482; see Chitty on Contracts, 12th ed., p. 207.

² See Chitty on Contracts, 12th ed., pp. 207, 208, 282.

³ 39 & 40 Vict., c. 79, s. 4; see Manual on Education, by James Williams, pp. 186, 188; and see Chitty on Contracts, p. 207.

were entitled to the custody and control of the infant as against the mother.

But by the Guardianship of Infants Act, 1886, it is provided that—

“On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father.”¹

Appointment by Mother.—The same Act further provides—

“The mother of any infant may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried); and where guardians are appointed by both parents they shall act jointly. The mother of any infant may, by deed or will, provisionally nominate some fit person or persons to act as guardians of such infant after her death jointly with the father of such infant; and the Court after her death, if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be authorised and empowered so to act as aforesaid, and make such other order in respect of the guardianship as the Court shall think right.”²

And every such guardian under this Act shall have the same powers as a guardian under 12 Car. II, c. 24, appointed by the father.³

Guardianship is a trust, and cannot be assigned.

If there are several testamentary guardians and one dies, the office does not determine, but goes on to the survivors; *aliter* as to guardians appointed by the Court, see *post*, p. 453.

Appointment by Court.—The jurisdiction of the Lord Chancellor to appoint guardians grew up soon after 12 Car. II, c. 24, by his providing for cases where the

¹ 49 & 50 Vict., c. 27, s. 2.

² *Ib.*, s. 3; and see *in re G.* (1892), 1 Ch., 292.

³ *Ib.*, s. 4; and see *re M'Grath* (1892), 2 Ch., 496.

father had omitted to appoint a testamentary guardian, the first recorded instance being in 1694.¹

This becoming established, the Court of Chancery was accustomed on application made to appoint a guardian to the infant for the protection of his or her person and property in case where he had no legal guardian, or where the legal guardian, including the father, was unwilling or unfit to act.² Instances of this interference with the father have already been explained; see *ante*, p. 435-445.

This original jurisdiction has from time to time been increased by statute; see *ante*, pp. 436-438, 443.

The Guardianship of Infants Act, 1886, provides—

“When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother;” and the Court . . . “may in their discretion, as being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed.”³

The application under this Act may be either to the High Court or to a County Court (see s. 9).

And by the Criminal Law Amendment Act, 1885, where it is proved that a father, mother, or guardian has

¹ See Hargraves' note to Coke upon Littleton, 88*b*; but a more ancient origin has been ascribed to it as existing originally in the Chancellor before the Court of Wards was erected by 32 Hen. VIII, c. 46, and on the dissolution of that Court reverting to the Chancellor; see per West, C., in *Morgan v. Dillon* (1724), 9 Mod. Rep., 135; *Eyre v. Shaftesbury, Countess of* (1722), 2 Peere Williams, 103, 119; and see per Lord Hardwicke, C., cited Amb., 302, n.; and *Smith v. S.* (1745), 3 Atk., 304.

² See *Butler v. Freeman* (1756), Amb., 301; *Wellesley v. W.* (1828), 2 Bli., N. S., 124; Stephen's Commentaries, tit. Guardian and Ward.

³ 49 & 50 Vict., c. 27, ss. 2 and 6.

caused, encouraged, or favoured the seduction or prostitution of a girl under sixteen, the Court can divest such person of all authority over the girl, and appoint any person willing to take charge of her to be her guardian till she attains twenty-one.¹

A Court of summary jurisdiction has power under the Prevention of Cruelty to and Protection of Children Act, 1889, where a parent or other person having custody of a child has been guilty of grave offences towards it, to appoint some other person to have custody and charge of such child.²

And when, under the Poor Law Act, 1889 (as quoted, pp. 438, 439), a Board of Guardians have by resolution vested in themselves the custody of a child, the Police Court may divest them of such custody and return the child to the parent.³

Further, a Police Court, where a husband has been convicted of an aggravated assault on the wife, can give the custody of the children to such wife; see pp. 366, 441.

As to whom the Court will appoint, the Court regards only the interests of the infant, and appoints whomever it thinks will take best care of the infant. And it considers, as between conflicting claims, the nearness of relationship. Also the wishes of father or mother, even if informally expressed, will be paid attention to. If the infant is of years of discretion, its wishes will be attended to, and the guardian whom it prefers will be appointed.

If a foreign Court has appointed a guardian to children who appear to be foreigners, the Court will not interfere by appointing an English guardian⁴

¹ 48 & 49 Vict., c. 69, s. 12.

² 52 & 53 Vict., c. 44, s. 5; and see *ante*, pp. 445-447.

³ *Ib.*, c. 56.

⁴ *In re Bourgoise* (1889), 41 Ch. D., 310, C. A.

As to determination of the guardianship. If several guardians are appointed, and one dies, the guardianship determines and ceases; *aliter* as to testamentary guardians, see *ante*, p. 450; but usually the surviving guardians are reappointed. If a female guardian other than the mother marries, the guardianship also determines.

Election by the Infant.—Also an infant can, where he has no guardian, appoint a guardian to himself, it seems, by deed.¹

But even if such guardian is appointed by the infant, application can still always be made to the Court to appoint a guardian; for such an appointment by the infant cannot supersede the authority and duty of the Court, and the guardian appointed by the Court supersedes and overrides the elected guardian.²

A guardian appointed by an infant has no power to assent to the infant's marriage, and in general his powers are undefined.³

Guardian by Tenure or Custom.—It is outside the scope of this work to discuss obsolete and rare forms of guardianship, such as guardianship in chivalry; guardianship in socage; guardianship by custom, as in the city of London, where there was a Court of Orphans;⁴ and by the custom of Kent, or by custom in a manor.⁵

(b) Powers and Duties of Guardian

Custody.—The guardian of an infant has a right to the

¹ See Davidson's *Precedents of Conveyancing*, 3rd ed., vol. v., pt. ii., p. 666, where a precedent of a deed for appointing a guardian is given; and see, too, the authorities there given in a note as to this kind of guardianship.

² *Curtis v. Rippon* (1819), 4 Mad., 462.

³ *In re Brown* (1881), 18 Ch. D., 61, C. A.

⁴ *Frederick v. F.* (1731), 1 Bro. P. C., 253; saved by 12 Car. II, c. 24, s. 9.

⁵ See *Ratcliff's case* (1592), 3 Co. Rep., 37a.

custody and possession of the infant's person.¹ If the infant goes to a house or person he disapproves of, and forbids her to visit, as in the case where a young lady of position went to a tavern kept by a relation, the guardian may send a police constable to bring her back.²

The guardian has a right to select a school for the infant; and if the infant refuses to go back to school, the Court will compel him. And in one instance, when an infant was a Cambridge undergraduate, who absented himself and refused to return, Lord Macclesfield sent him to the university in the custody of his own tipstaff, who was further ordered to keep him there.³

Religion and Education.—It is a settled rule that the child is to be brought up in the religion of the father.⁴ The only exception is, that where an infant ward is of sufficient age and intelligence to have received and formed, and has received and formed, other religious impressions and convictions, strong and apparently fixed, the Court shrinks from the consequences of any attempt to disturb them.⁵

Neither, if the control of child becomes vested in the guardians under the Poor Law Act, 1889 (see the section quoted, *ante*, pp. 438, 439), have the guardians power to have it brought up in a religion different from the father's.⁶

¹ *R. v. Clarke* (1857), 7 E. & B., 186.

² *Fleming v. Pratt* (1823), 1 L. J. K. B., O. S., 194.

³ *Hall v. H.* (1749), 3 Atk., 721; *Tremain's case* (1720), 1 Strange, 167; and see *ante*, p. 433.

⁴ See *Violet Nevin* (1891), 2 Ch., 299, C. A.; and see *Alicia Race* (1857), 1 H. & M., 420, n., where the Court of Chancery altered the result of the decision of the Queen's Bench on *habeas corpus*, 7 E. & B., 186; and see p. 433.

⁵ Per the Court of Appeal in *re Besant* (1879), 11 Ch. D., 508, p. 519; and see in *re Scanlan* (1888), 40 Ch. D., 200; and see *re McGrath* (1892), 2 Ch., 496.

⁶ 52 & 53 Vict., c. 56, s. 1 (6).

Maintenance.—It is the duty of the guardian to see that the infant is suitably maintained, not out of the guardian's moneys, but out of the property of the infant. Such property of the infant sometimes is, and sometimes is not, vested in the guardian; in either case maintenance may be, and in most cases is, allowed out of the income of the property, either by the guardian or trustee holding such property, or by the Court.

The power of trustee to allow maintenance was increased by the Conveyancing Act, 1881, which enacts—

“Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of the property, or any part thereof, whether there is any other trust applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not.”¹

But in a case of any doubt or difficulty as to the amount or property of the maintenance allowed, application can and should be made to the Court; and all such applications are usually heard in Chambers privately.

Property.—The guardian's powers over the infant's property are various and complicated, and are not the subject of discussion in this work.

Marriage and Chastity.—It is the duty of the guardian to prevent the ward making an unfitting marriage, that is to say, below him or her in point of rank, or fortune, or incongruous in point of age.

If the ward attempts to run away, the guardian can detain her and her clothes, or get them back from the carrier.²

But the most proper course for a guardian, if a suspi-

¹ 44 & 45 Vict., c. 41, s. 43; and see *re Burton* (1892), 2 Ch., 38; and see *ante*, p. 448.

² *Barker v. Taylor* (1823), 1 C. & P., 101.

cion arises that the ward may be married or seduced, is to apply to the Court; and the Court acting instantly without proof, but on reasonable suspicion for the protection of the ward, will restrain the suspected person from having intercourse with or marrying the ward.¹

If any one marries the ward without consent, and more especially after being restrained, it is a high contempt; and such contempt is habitually punished, by such person and the abettors being committed.² The usual course is to compel the person so marrying the ward to execute a proper settlement, and till that is done, to send him to gaol;³ but the Court has no power to compel the infant ward against his or her will to execute a settlement; and if, under such compulsion, he or she executed a settlement, it will be set aside.⁴

Also, when a person is, after injunction, guilty of a breach of the injunction by communicating with the ward, he or she will be punished.

In such a case, a Mr. C. A. R. Hoare, a married man, and double the age of the ward, was restrained by injunction from holding intercourse with Miss Sumner, a young lady of quality and position. After the order he received from her five or six letters with lithographed address, passing through her uncle and through Lady C. ;

¹ For a form of the order, which is most comprehensive, see Seton on Decrees, vol. ii., p. 758; see an early case, *Smith v. S.* (1745), 3 Atk., 304.

² See *Hill v. Turner* (1737), 1 Atk., 515; *More v. M.* (1741), 2 Atk., 157; *Bolton v. B.* (1891), 3 Ch. 270, C. A.

³ The object is to prevent a needy person gaining the heiress's fortune; as Lord Egerton, L. C., said, "He that steals flesh, let him provide bread how he can;" *Strawson v. Cross* (1612), Cho. Ca. Ch., 50; in one case the Lord Chancellor thought commitment not sufficient, held it a conspiracy, and ordered an information in the King's Bench; *Schreiber v. Lateward* (1781), 2 Dick., 592; and see *post*, pp. 474, 477.

⁴ *In re Leigh* (1888), 40 Ch. D., 290, C. A.

Mr. Hoare read such letters, and did not on receiving these letters communicate with the Court or Miss Sumner's father. On this the Court came to the conclusion that a contempt had been committed by Mr. Hoare; but as the contempt was small, and he was tempted in receiving the letters, and as the mischief was then irreparable, because the ward on attaining twenty-one had commenced and was then cohabiting in adultery with Mr. Hoare, it only punished him by ordering him to pay the costs.¹

It is also the duty of a guardian to prevent a male ward contracting improper intimacies.²

The guardian has the power of consenting to the marriage under the Marriage Act (see *ante*, p. 52); but if the infant is a ward of Court, the consent of the Court must be obtained, not as regards validity, but in order that the party may not be in contempt; and the consent of the guardian or even the father will not suffice if the Court consider the marriage improper.³

As to abduction, etc., of an infant, see *post*, pp. 474, 477.

SEC. 4.—CESSATION OF MINORITY

(a) *Age of Majority*

As a general rule, the age of majority is twenty-one years complete, though sometimes testators and settlors declare the children shall not come of age till twenty-five, by providing that they are not to receive their portions till then, or if they marry without consent before

¹ *Sumner v. Kingscote* (1885), 1 T. L. R., 351.

² Not long ago the Court of Chancery recovered by injunction a box of love letters, written by the infant ward to a prostitute, which the prostitute's landlord had distrained for rent; the box was deposited with the Court of Chancery, and there remained, *ex rel adv.*

³ *Butler v. Freeman* (1753), Amb., 301.

twenty-five they shall forfeit them ; yet, except as thus provided, such young persons between twenty-one and twenty-five can do all legal acts.¹ If the child is twenty-one years old and the father detains it, as to prevent a daughter eloping with a footman, *habeas corpus* lies.²

But also when the child has reached years of discretion, the Court will not, against the child's wishes, restore it to the father or guardian by *habeas corpus* ; such years of discretion are fourteen for a boy and sixteen for a girl.³ The father is legally entitled to the custody of a girl under sixteen, and she is not of an age to exercise a discretion to withdraw herself therefrom. Persons detaining such a child from the father's protection, though with her consent, will therefore be ordered by the Court, on proceeding by *habeas corpus*, to give her up to the father.⁴

(b) *By Emancipation*

Emancipation by parent releasing the child from parental control is still a doctrine almost unknown to the English law ; except that a child who leaves the parental household and sets up independently, is said to be emancipated, and thereby acquires a Poor Law settlement.⁵ But in America the doctrine of emancipation is important, and widely recognised.⁶ However, it has been decided in England that a father cannot be compelled to act as guardian *ad litem* to a son who is forisfami- liated.⁷

¹ *Anon* (1702), 1 Salk., 44.

² *R. v. Clarke* (1758), 1 Burr., 606.

³ See *ex parte Barford* (1860), 8 Cox C. C., 405 ; per cur *in re Agar Ellis* (1883), 24 Ch. D., 317, C. A., and cases there cited.

⁴ *R. v. Howes* (1860), 3 E. & E., 332.

⁵ *R. v. Halifax* (1775), Bur. Set. Cas., 806 ; *R. v. Wilmington* (1822), 1 D. & R., 140.

⁶ See Schouler's Domestic Relations.

⁷ *Boraine's case* (1809), 16 Ves., 346 ; *Beaurain v. Scott* (1813), 3 Camp. N. P., 387.

(c) *By Marriage*

A parent cannot appoint a guardian under the powers above detailed (pp. 449, 450) to a married child. But the marriage of a male child or ward does not determine the paternal authority or guardianship; as to a female child it appears doubtful.¹ An infant widow or widower can obtain a marriage licence without the parent's consent; see *ante*, pp. 49, 52.

SEC. 5.—POWERS, DISABILITIES, AND LIABILITIES OF AN INFANT.

(a) *Contracts*²

Infants Relief Act, 1874.—It is provided by the *Infants Relief Act*, 1874,³ s. 1—

“All contracts, whether by specialty or simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants; shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of Common Law or equity, enter, except such as now by law are voidable;” and by s. 2, “No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.”

The construction of the Act is not free from difficulty; it specially arises from the inconsistencies in reading together the two sections.

The recent Betting and Loans (Infants) Act, 1892, provides that if an infant who has contracted a loan, void in

¹ See *Mendes v. M.* (1747), 3 Atk., 619, p. 625; 1 Vesey, 89; *Roach v. Garvan*, *ib.*, 158.

² See Chitty on Contracts, 12th ed., pp. 194–210.

³ 37 & 38 Vict., c. 62.

law, shall agree after majority to pay it, such agreement is wholly void, however drawn up, and as against all persons.¹

The following contracts of an infant are valid :—

Necessaries.—An infant can enter into valid contract for necessaries ; as to what are necessaries for an infant is a mixed question of law and fact, and depends on the infant's rank, future, and position. Such necessaries will include, besides the ordinary requirements of life, meat, drink, lodging, clothes, things reasonably appurtenant to the patient's rank. For instance, amethyst and diamond earrings presented by a rich infant to a young lady of fifteen, to whom he was then engaged, and soon after married, were held necessaries ; but rich and costly betting books were, in the same case, held not necessary.² And in order to show that the articles supplied were not necessaries, the infant may prove that at the time of the sale he was already sufficiently provided with goods of the kind supplied.³ The question whether or not the articles supplied were necessaries is for the jury, but the affirmative of this is on the plaintiff to prove ; and the judge ought not to leave the question to the jury unless he is satisfied that there is evidence on which they could properly find in favour of the plaintiff ; and in this case, where the plaintiff had supplied to the defendant, the younger son of a deceased baronet, jewellery in the shape of studs at £25, and a goblet at £15, 15s., for presents to the defendant's friends, the Court held that these could not be necessaries.⁴

Apprenticeship and Service.—Contracts of service, either by way of the apprenticeship or of ordinary hiring, are,

¹ 55 Vict., c. 4, s. 5.

² *Jenner v. Walker* (1868), 19 Law Times, 398 ; and as to necessaries, see also *ante*, p. 180.

³ *Johnstone v. Marks* (1887), 19 Q. B. D., 509.

⁴ *Ryder v. Wombwell* (1868), L. R., 4 Ex., 32 Ex. Ch.

if beneficial to the infant, binding on him or her; but the Court will always consider whether the contract is an equitable one before enforcing it. A teacher of stage dancing engaged Ada and Helen Maude Parnell, two girls of twelve and fourteen years, as apprentices for seven years, to be taught ballet dancing, upon terms by which the infants bound themselves not to accept any professional engagement or contract matrimony during the said term without the consent of her master. The deed also contained mutual covenants by the master and the parent that the master would properly instruct the infants and make certain payments to them for all dancing engagements in England and in foreign and colonial countries; in return for which the infants' services were to be entirely at the disposal of the master. But there was no stipulation that the master should provide engagements for the infants, or maintain them while unemployed. There was also a provision that the master might put an end to the apprenticeship if the infant should be found, after fair trial, unfit for the work of stage dancing, or should break any of the engagements of the deed, or in any way misconduct herself. The infants having made a professional engagement with the defendant Barnum, Fry, L. J., held that the provisions of the deed were unreasonable, and could not be enforced against the infants or their parents, or against Barnum.¹

Also a clause in an apprenticeship deed whereby the employer was not to be liable to pay wages during a "turn out," was held to be so contrary to the infant's

¹ *De Francesco v. Barnum* (1890), 45 Ch. D., 430; even if the contract had been reasonable and valid it could not have been enforced against Mr. Barnum or the infant by injunction, or against the infant by action for damages (see *post*, p. 468); the present action was against Mr. Barnum for damages.

benefit as therefore to vitiate and nullify the whole contract.¹

But if the apprenticeship is a necessary to the infant, and the instruction is fair and reasonable, he will be liable to pay the premium therefor, even though it be due on a bond.²

Statutory Restrictions on Employment of Children and Young Persons.—Statutory restrictions have, by the Elementary Education Acts, the Factory and Workshops Acts, and the Shop Hours Regulation Acts, been imposed on the employment of “children” and “young persons”; a “child” being a person under fourteen, and a “young person” a person between fourteen and eighteen years old. By the Elementary Education Act, 1876, there is a general prohibition on the employment of a child under ten years old,³ with the exception that a child of seven years old may be licensed to perform in a public entertainment or a circus.⁴

Also by the Factory and Workshops Act, 1891, there is a general prohibition on the employment of a child under eleven years old in a factory or workshop.⁵

By the Elementary Education Act, 1876, there is a general prohibition of the employment of a child between ten and fourteen, except where a certificate of proficiency has been obtained, or in cases coming under the Factory and Workshops Acts.⁶

¹ *Meakin v. Morris* (1884), 12 Q. B. D., 352.

² *Walter v. Everard* (1891), 2 Q. B., 369, C. A.

³ 39 & 40 Vict., c. 79, ss. 5 and 47; but by s. 9 certain exceptions are introduced in case there is no school within two miles, or if the employment does not interfere with the education, or if the employment is by the local authority specially exempted.

⁴ 52 & 53 Vict., c. 44, s. 3.

⁵ 54 & 55 Vict., c. 75, s. 18.

⁶ 39 & 40 Vict., c. 79, s. 5; and see 43 & 44 Vict., s. 4. For a general explanation of the Elementary Education Acts, which are complicated, see the text-book by H. Owen, and J. Williams' Education Manual.

The Factory and Workshops Acts, 1878 to 1891, contain numerous and complicated provisions as to the employment of children and young persons, which it would be impossible to explain here.¹

The Shop Hours Act, 1892, provides that no young person shall be employed in a shop for more than seventy-four hours, including meal times, in any one week; but this does not apply to shops where the only persons employed are members of the same or the employer's family residing there.²

Education.—An infant may bind himself to pay for his good teaching and instruction, whereby he may profit himself afterwards,³ whether said instruction be in a trade or otherwise, and whether or not the obligation be by bond.⁴

Marriage and Settlements.—An infant cannot be bound by a promise to marry so as to be liable to be sued thereon, for it is within the Infants Relief Act, 1874, above quoted;⁵ but she or he can sue an adult on their promise. An infant cannot enter into a valid marriage settlement without the sanction of the Court under the Infants Settlements Act.⁶ If an infant enters into a settlement without the sanction of the Court, the infant, although he entered it with his free will, can, unless he has ratified it, avoid it within a reasonable time after attaining majority; but if the infant elects to avoid, the

¹ 41 & 42 Vict., c. 16; 46 & 47 Vict., c. 53; 52 & 53 Vict., c. 62; 54 & 55 Vict., c. 75; see Redgrave's Factory Acts. Similar provisions are contained in the Mines Act, Coal Mines Act, and other statutes regulating labour.

² 55 & 56 Vict., c. 62, re-enacting 49 & 50 Vict., c. 55.

³ See Chitty on Contracts, 12th ed., p. 198, and J. Williams' Education Manual.

⁴ *Walter v. Everard*, *ubi sup.*

⁵ *Coxhead v. Mullis* (1878), 3 C. P. D., 439; and see *Holmes v. Brierly* (1888), 36 W. R., 795, C. A., and Chap. XII, pp. 410, 411.

⁶ 18 & 19 Vict., c. 43.

infant loses *pro tanto* his interest under the settlements, which are impounded to compensate those disappointed by his avoiding the settlement.¹ If he has entered into it under the sanction of the Court, the settlement is valid,² unless he was forced into such settlement, when not even the sanction of the Court will render it valid, and he can avoid it.³

Trade Debts.—Trade contracts and debts by an infant are void.⁴

Representation of Majority.—An express fraudulent representation by the infant that he is of full age, made to a person believing and acting on the infant's representation, renders the infant liable in equity so far as the contract has been executed.⁵

(b) Acts

Sales and Leases.—Conveyances on sale by and to, and leases by an infant are not void, but voidable;⁶ but an infant of fourteen can, by custom of Kent, convey gavel-kind land by a deed of feoffment; and this is very usual in practice in that county.

In a lease to an infant he cannot be sued on his covenant to pay rent; though, if he has entered and paid for the furniture or rent, he cannot recover it back.⁷

¹ *Carter v. Silber* (1892), 2 Ch., 278, 63, C. A.; *Hamilton v. H.* (1892), 1 Ch., 396.

² *In re Scott* (1891), 1 Ch., 298.

³ *In re Leigh* (1888), 40 Ch. D., 290, C. A.; and see *ante*, Chap. IV, p. 192.

⁴ *Ex parte Jones*, 18 Ch. D., 109, C. A.

⁵ *Wright v. Snowe* (1848), 2 De G. & S., 321; *Nelson v. Stocker* (1859), 4 De G. & J., 458; and see Simpson on Infants, 2nd ed., pp. 101–103.

⁶ See per Pearson, J., *Burnaby v. Equitable Reversionary Society* (1885), 28 Ch. D., 419, 420; per Sugden, L. C., *Allen v. A.* (1842), 2 Dru. & War., 307; *Slator v. Trimble* (1861), 14 Ir., C. L., 342.

⁷ *Valentini v. Canali* (1889), 24 Q. B. D., 166.

Gifts.—A gift by an infant is voidable, and if made without undue influence will be good.¹

Wills.—By the Wills Act, 1837,² an infant cannot make a will, though previous to this statute he could bequeath personal property. But an infant of sixteen can make a “nomination” under the Savings Bank and other Acts.³

Commercial Transactions.—An infant cannot be sued either as drawer, acceptor, or indorser of a bill of exchange or promissory note.⁴ An infant is not liable on a warranty, and cannot give a good receipt for payment. An infant can give an acknowledgment so as to prevent the Statute of Limitations from running.

An infant can be a member of a friendly society, and he may also be a shareholder; but in the latter instance he may repudiate his shares.⁵

Presentation to Living.—An infant patron owner of an advowson can present to a living however young the infant may be.⁶

(c) Capacities

Public Office.—An infant cannot occupy any public office of trust or pecuniary liability, such as a member of Lords or Commons or clerk to the Court of Requests; but he may occupy ministerial offices requiring moderate skill, such as Sheriff, clerk of the Peace.⁷

¹ *Taylor v. Johnston* (1882), 19 Ch. D., 603.

² 7 Will. IV, and 1 Vict., c. 26, s. 7; and see the Manual on Wills and Intestate Succession in this series, by J. Williams.

³ See Manual on Wills, p. 139, by J. Williams.

⁴ In *Soltykoff ex parte Margrett* (1891), 1 Q. B. 413.

⁵ As to this see the Manual on Partnership and Companies, by P. F. Wheeler; and see *re W. Laxon & Co.* (1892), W. N., 115.

⁶ See Simpson on Infants, 2nd ed., pp. 86, 87.

⁷ The most recent cases on these points are *Claridge v. Evelyn* (1821), 5 B. & Ald., 81; *Cuckson v. Winter* (1828), 2 M. & R., 313; *Crosbie v. Hurley* (1833), Al. & Nap., 431. An infant Peer, however, is entitled to trial before the House of Lords.

Witness.—At Common Law an infant may be a witness if he understand the nature of an oath.¹ The Criminal Law Amendment Act, 1885, and the Prevention of Cruelty to Children Act, 1889, have enabled a Court in cases coming under these Acts to receive the unsworn evidence of a child too young to understand the nature of an oath, so long as the child understands the duty of telling the truth.²

Executor, Trustee, and Agent.—An infant may be appointed, but cannot act as executor or trustee;³ but he can be appointed and act as agent.⁴

(d) Liability for Injuries

Civilly.—An infant is liable for all injuries (such as are legally known as “torts”) committed by him or for him; and he can therefore be sued for slander, assault, etc.; and an infant has frequently been made a co-respondent to a divorce petition; see *ante*, pp. 252, 255; *post*, p. 468, n. 1.

A Cambridge infant undergraduate was held liable for tort in these circumstances. He had hired from a livery stable a mare for a ride at 7s. 6d., and being expressly told she was not fit to jump, but if that he wished to jump he could have another horse at a guinea. The infant nevertheless let his friend take it out for a ride with him, and as they jumped a wattled fence, the mare was staked and died. The infant was held liable therefor, not on the ground of hiring, but for a trespass outside the object of the hiring, as if the defendant had gone into the field,

¹ See Archbold, Criminal Practice.

² 48 & 49 Vict., c. 69, s. 4; and 52 & 53 Vict., c. 44, s. 8.

³ See the Manual on Wills and Intestate Succession, by J. Williams.

⁴ See the Manual on Agency.

taken the mare out, hunted her, and killed her.¹ And in another case an infant was held liable for overdriving a mare which he had hired.²

For fraud an infant is also liable.³

*Criminally.*⁴—An infant over fourteen may be prosecuted and convicted as if of full age; so where an infant over fourteen years of age fraudulently converted to his own use goods which had been delivered to him by the owner under an agreement for the hire of the same, for he was convicted of larceny as a bailee of the goods; and the conviction was upheld by the Court for the consideration of Crown cases reserved.⁵

An infant under seven years old cannot be prosecuted for felony.⁶ Between the ages of seven and fourteen an infant is *prima facie* presumed *doli incapax*, but *malitia supplet ætatem*, and such presumption may be rebutted by evidence that the infant prisoner possessed a mischievous discretion. So where an infant, John Dean, between eight and nine years old, was found guilty at Abingdon Assizes, *coram* Whitlock, J., of burning two barns in the town of Windsor, and it appearing upon examination that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was hanged accordingly;⁷ and a boy of twelve years old was convicted as a pathic under a charge of sodomy.⁸ But a boy under fourteen cannot be convicted of rape, or of an assault with an attempt to commit a rape, or for carnally

¹ *Burnard v. Haggis* (1863), 14 C. B., N. S., 45.

² *Wulley v. Holt* (1876), 35 L. T., 631.

³ *Ex parte Unity Joint-Stock Bank* (1858), 3 De G. & J., 63, App.

⁴ See generally, Archbold's Criminal Practice, and Hale's Pleas of the Crown, vol. i., chap. iii.

⁵ *R. v. Macdonald* (1885), 15 Q. B. D., 323.

⁶ *Marsh v. Loader* (1863), 14 C. B., N. S., 535.

⁷ Archbold's Criminal Practice, and Hale's Pleas of the Crown.

⁸ *R. v. Allen* (1848), 1 Den., 364.

knowing a girl under sixteen, nor if it be proved he is under fourteen any evidence admissible to show that he could in fact commit rape and had arrived at puberty; but under this he may be convicted of a common assault.¹ A boy under fourteen may be and sometimes is convicted of an indecent assault.²

(e) *Remedies by and against Infant*

An infant sues by a next friend and defends by a guardian *ad litem*;³ but in the County Court, by the County Courts Act, 1888, an infant can sue for money due as wages, or for piecework, or for work as a servant, as if he were of full age.⁴

If there is a doubt whether an action commenced by the next friend is not proper, there will be an inquiry whether it is for the infant's benefit.

The compromise of action by or against him requires the approval of the Court, but cannot be enforced upon his advisers; and although made in good faith, will be set aside if not for his benefit.⁵

The infant does not bind himself by making admissions, and is not liable to answer interrogatories or make discovery.⁶

Neither can an infant, it would seem, be adjudicated a

¹ *R. v. Jordan* (1839), 9 C. & P., 118; *R. v. Brimilow* (1840), *ib.*, 336, and cases there cited.

² *R. v. Read* (1849), 2 C. & K., 957.

³ See Rules and Orders of the Supreme Court, Order XVI, rules 16, 18, 19, and 21; except an infant co-respondent, who can appear and be cited without a guardian, Divorce, rule 108; and see *ante*, Chap. VII, pp. 252, 255, and 466.

⁴ 51 & 52 Vict., c. 43, s. 96.

⁵ See Chitty on Contracts, 12th ed., p. 201; *Rhodes v. Swithenbank* (1889), 22 Q. B. D., 577, C. A.

⁶ *Mayor v. Collins* (1890), 24 Q. B. D., 361; and *Redfern v. R.* (1891), P., 139, C. A.; *Curtis v. Mundy* (1892), 2 Q. B., 178.

bankrupt, unless, perhaps, he has fraudulently represented himself as of full age.¹

An infant apprentice cannot be sued for damages on his contract to serve, or restrained by injunction from breaking it by serving other persons ; nor will such other persons be restrained by injunction from employing him or her ; for the remedy on an apprenticeship deed is summary by a proceeding before magistrates.²

But an ordinary contract to serve which is beneficial to the infant, and therefore valid, can be enforced by injunction.³

As to protection of young persons by the Criminal Law Amendment Act, 1885, see *post*, Chap. XV, pp. 481, 482. Sending circulars or letters to an infant inciting him or her to bet or to borrow money, is made a misdemeanour by the Betting and Loans Infants Act, 1892.⁴

¹ *Ex parte Jones* (1881), 18 Ch. D., 109, C. A.

² *De Francesco v. Barnum* (1889), 43 Ch. D., 165 ; for the facts of this very interesting case, see *ante*, p. 461.

³ *Fellows v. Wood* (1888), 59 L. T., 513.

⁴ 55 Vict., c. 4.

CHAPTER XV¹

CRIMES

<p>1. Regarding the Marriage, . 470</p> <p style="padding-left: 20px;">(a) <i>In the Minister</i>, . 470</p> <p style="padding-left: 20px;">(b) <i>In the Parties</i>, . 472</p> <p>2. Abduction and Forcible Marriage, . . . 474</p> <p style="padding-left: 20px;">(a) <i>Against the Party's Will</i>, . . . 474</p> <p style="padding-left: 20px;">(b) <i>By Consent of the Party</i>, . . . 474</p>	<p>3. Bigamy, . . . 475</p> <p>4. Miscellaneous Offences, . 477</p> <p>5. Crimes between Husband and Wife, . 478</p> <p>6. Rape, etc., . . . 480</p> <p>7. Protection for Young Persons, . 481</p>
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SEC. 1.—REGARDING THE MARRIAGE

(a) *In the Minister*

As regards Church of England marriages, it is enacted that any person solemnising marriage in neglect of the statutory formalities, *i.e.*, not in a parish or licensed church, or outside the proper hours, or without banns or licence, or any person falsely pretending to be in holy orders and solemnising marriage, shall, on being convicted of therein knowingly and wilfully offending, be guilty of felony, and liable to fourteen years' penal servitude. The prosecution must be commenced within three years

¹ See Roscoe's Criminal Evidence ; Archbold's Criminal Pleadings ; Russell on Crimes ; and see Mead and Bodkin on the Criminal Law Amendment Act.

after the offence committed.¹ There does not appear to have been any recent prosecution of a clergyman under the first part of the section, though at the time of Lord Hardwicke's Act several clergymen were convicted of marrying contrary to its provisions, and transported.² Under the latter part of the section there was a prosecution, in 1888, of G. F. W. Ellis, who had been instituted rector of Wetheringsett, in Suffolk, and subsequently found out to have been never really ordained, but to have obtained institution by forged letters of orders.³

If a clergyman refuses to marry parties, it seems doubted whether he can be indicted criminally for it.⁴

As to Nonconformist and registrars' marriages, any person knowingly and wilfully unduly solemnising marriages, either by reason of the solemnisation not being in a registered building, except for Quakers and Jews, or by reason of the solemnisation being in the absence of the registrar, or by reason of the solemnisation being without proper licence from or notice to the registrar, is guilty of felony.⁵ A superintendent-registrar unduly issuing certificates, or unduly registering, or unduly solemnising marriage, if such act is done knowingly and wilfully, is guilty of felony.⁶

A person refusing or omitting to register a marriage solemnised by him, or which he ought to register, or carelessly losing or injuring, or allowing to be injured, a register in his custody, is liable to a penalty of £50 for each offence.⁷

¹ 4 Geo. IV, c. 76, s. 21, and 54 & 55 Vict., c. 69, s. 1; and see Chap. II, s. 3, pp. 31-77.

² See *R. v. Northfield* (1781), 2 Douglas, 658, 660, where Lord Mansfield mentions prosecuting the minister of the Savoy.

³ *R. v. Ellis* (1888), 16 Cox C. C., 469.

⁴ *R. v. James* (1850), 3 C. & K., 167; nor can he be sued civilly for damages; *Davis v. Black* (1841), 1 G. & D., 432; and see *ante*, pp. 58, 59.

⁵ 6 & 7 Will. IV, c. 85, s. 39.

⁶ *Ib.*, s. 40.

⁷ *Ib.*, c. 86, s. 42.

Destroying, altering, or forging parish registers and giving false certificates,¹ or making false entries in copy of register sent to registrar, is felony.² Under this last provision, a witness to a marriage was convicted for signing in a wrong name under the following facts:—One Wilcocks was engaged to be married to Sarah Ann Kinlock; but he, being a married man, had assumed the name of Richardson. The friends of Miss Kinlock, knowing little or nothing of Richardson, had insisted that some member of Richardson's family should be present at the marriage. Richardson made the acquaintance of the prisoner in a casual manner, in a train on the Great Northern Railway, and invited him as a guest to the wedding. On the prisoner's arrival on the morning the marriage was to be solemnised, Richardson told the prisoner that his brother had failed to be present, and asked him to personate his brother. This the prisoner, after some reluctance, agreed to, and, after the ceremony was concluded, signed his name in the parish register of marriages as "Geo. Richardson," there being also two other witnesses. Before the bride and bridegroom left, the prisoner admitted the deception he had practised, and the marriage was never consummated. Richardson, *alias* Wilcocks, was indicted and convicted for bigamy. The prisoner was convicted of making a false entry in a marriage register, notwithstanding that there was no proof of fraudulent intention, and sentenced to a month's imprisonment.³ For other offences against the Marriage Acts, see *ante*, Chap. II.

(b) *In the Parties*

Taking a false oath to obtain a licence for marriage

¹ 24 & 25 Vict., c. 98, s. 36.

² *Ib.*, s. 37.

³ *R. v. Asplin* (1873), 12 Cox C. C., 391.

from a surrogate, under 4 Geo. IV, c. 76, is not perjury,¹ but it may be criminally punished as a misdemeanour.² Neither can a layman, taking a false oath under these circumstances, be punished in the Ecclesiastical Court.³ And as to Nonconformist marriages, see *ante*, Chap. II, s. 4, pp. 78–103. A person knowingly making or signing any false declaration or notice before a registrar to procure a marriage is guilty of perjury.⁴

Wilfully making, or causing to be made, for the purpose of being inserted in any register of marriage any false statement touching any of the particulars required to be registered, is declared equivalent to perjury.⁵ As to other offences connected with registers, see *supra*, pp. 471, 472; and see *ante*, Chap. II, pp. 75–77, 93–97, 100, 102.

A printer, Heywood, having courted a woman who became pregnant by him, then, in order to induce her father to consent to her cohabiting with him, procured the marriage lines of another person, printed a copy, leaving blanks, which he filled up with his own and the woman's name, and added the name of the parish clergyman as the solemniser, and the clerk as witness. He gave this pretended certificate to the woman in order that she might give or show it to her father, which she did. It was held that Heywood could not be convicted of *uttering*, under 11 Geo. IV, and 1 Will. IV, c. 66, s. 20,

¹ *R. v. Foster* (1821), R. & R. C. C., 459.

² *R. v. Chapman* (1849), 1 Den. C. C., 432; but the ecclesiastical official before whom the oath is taken must be properly appointed; *R. v. Verelst* (1813), 3 Camp., N. P., 431.

³ *Phillimore v. Machon* (1876), 1 P. D., 481.

⁴ 19 & 20 Vict., c. 119, s. 2; and see *R. v. Smith* (1865), 4 F. & F., 1099.

⁵ 6 & 7 Will. IV, c. 86, s. 41; see *R. v. Brown* (1848), 1 Den. C. C., 291; and *Field v. Brown* (1853), 17 Beav., 146, p. 148; *R. v. Lord Dunboyne* (1850), 3 C. & K., 1; *R. v. Smith* (1865), 4 F. & F., 1099.

as the only utterance was to the woman, who was a party to the transaction, and an accomplice.¹

SEC. 2.—ABDUCTION AND FORCIBLE MARRIAGE

(a) *Against the Party's Will*

Abducting or detaining a woman of any age, whether or not an heiress, against her will, in order that she may be married or carnally known, is felony, punishable with fourteen years' penal servitude.²

(b) *By Consent*

Taking away a woman under twenty-one without her father's consent, although by her own will, is an offence at Common Law ;³ and a plot to inveigle a young gentleman of fortune under twenty-one into a low marriage without his father's consent, is indictable as a conspiracy.⁴

An agreement between parties to procure and seduce a woman, as between a theatrical manager and a baronet, that the latter should have carnal intercourse with an opera singer, aged nineteen or more, is indictable as a conspiracy at Common Law.⁵

¹ *R. v. Heywood* (1847), 2 C. & K., 352. The present enactment is 24 & 25 Vict., c. 98, s. 37.

² 24 & 25 Vict., c. 100, ss. 53, 54 ; see *Hawkins' Pleas of the Crown*, bk. i., chap. xli., for early law ; and see *Fulwood's case* (1638), Cro. Car., 482, 484, 488, 493.

³ *R. v. Pierson* (1737), Andr., 311.

⁴ *R. v. Thorp* (1695), 5 Mod., 218-224, 1 Com., 26 ; *R. v. Blacket* (1702), 7 Mod., 39 ; *Schreiber v. Lateward* (1781), 2 Dick., 592 ; *R. v. Green or Shreiber* (1781), 3 Doug., 36 ; and see *post*, p. 477.

⁵ *R. v. Sir F. Delaval* (1763), 1 W. Bl., 410, 438 ; *R. v. Howell* (1864), 4 F. & F., 160 ; *R. v. Mears* (1851), 2 Den. C. C., 79 ; and now by the Criminal Law Amendment Act, 1885, the procuring a girl under twenty-one, not a prostitute, to have carnal intercourse, or the procuring of a woman of any age to become a prostitute, is a misdemeanour, punishable with two years' imprisonment, 48 & 49 Vict., c. 69, s. 2.

The statute 4 & 5 P. & M., c. 8 (repealed and re-enacted by 9 Geo. IV, c. 31, ss. 1, 19, and 20), prohibited the taking away of maidens between twelve and sixteen years old against the consent of their guardians or parents, even by their own consent.¹

By the present statute, the abduction of an heiress under twenty-one against the will of her father or guardian from motives of lucre, although she herself consent, is felony, punishable with fourteen years' penal servitude.²

Also, the abduction of a girl under eighteen out of the possession and against the will of her father and mother, is a misdemeanour punishable with two years' imprisonment,³ the law being more stringent if she is under sixteen.⁴

If the infant eloping is a ward of Court, all parties helping or causing the elopement are guilty of contempt of Court, for which they are punishable; see *ante*, pp. 55, 455-457.

As to eloping with a nun, see *ante*, p. 23, n. 4.

SEC. 3.—BIGAMY⁵

Bigamy is the offence of marrying a second time during the life of the former husband or wife. It is immaterial where the first marriage took place, but its validity must be strictly proved; see *ante*, Chap. II, pp. 125, 126. As to the second marriage, if the prisoner is a British subject, it is immaterial where it took place; but if not, it must have been solemnised within England or Ireland, and it is immaterial that it may be invalid.⁶ It

¹ See *R. v. Pierson*, *ubi sup.*; *Ridley v. Wilson* (1749), Amb., 73; and see Hawkins' P. C., bk. i., chap. xli., tit. Seduction.

² 24 & 25 Vict., c. 100, s. 53; *R. v. Barratt* (1840), 9 C. & P., 387.

³ 48 & 49 Vict., c. 69, s. 7.

⁴ 24 & 25 Vict., c. 100, s. 55.

⁵ 24 & 25 Vict., c. 100, s. 57.

⁶ *R. v. Allen* (1872), L. R., 1 C. C., 367.

is also a ground of defence that the first marriage had been declared null and void, or that previous to the second marriage the first has been terminated by a divorce from a competent Court ; as the effect of foreign divorce, see Chap. XVII, p. 525 ; as to what is divorce, etc., in England, see Chap. XIII, pp. 416 and seq.

The survival of the first spouse at the date of the intermarriage with the second should be strictly proved. As to presumption of life and death where there is no actual proof, see *ante*, Chap. III, pp. 126, 144–148. As to conflicting presumptions of innocence, life, and death. In such a case the question of fact should be left to the jury, as in a recent bigamy prosecution, where it was proved that in 1864 the prisoner, Willshire, married Ellen Earle. In 1868 he was charged with bigamy in marrying Ada Mary Susan Leslie, his wife Ellen being then alive, and was on such charge convicted. In 1879 he married Charlotte Georgina Lavers, and in 1880, Charlotte Georgina Lavers being then alive, he married Edith Maria Miller. Afterwards, upon a charge of bigamy in marrying Edith, Charlotte being then alive, the prisoner was convicted, it being held by the Common Sergeant, Sir W. Charley, that there was no evidence that Ellen was alive when the prisoner married Charlotte, or that the marriage with Charlotte was invalid by reason of Ellen being then alive. But it was held by the Court for the consideration of Crown cases reserved, that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts Ellen was alive or not when the prisoner married Charlotte.¹

Even if such first spouse was or is alive, it is a good ground of defence by the statute that the former husband or wife shall have been continually absent from

¹ *R. v. Willshire* (1881), 6 Q. B. D., 366.

the prisoner for seven years then last past, without being heard of ;¹ and the Courts have further extended this provision to the effect that although such seven years had not elapsed, still it is a good defence that it is proved the prisoner, at the time of the second marriage, had a *bonâ fide* belief from reasonable grounds that the former spouse was dead.²

If the person with whom the bigamist has gone through the ceremony of marriage knows that the bigamist was married, such person may be convicted of the felony of counselling the bigamist to commit bigamy.³

The second husband or wife, but not the first, can be called as a witness against the bigamist.⁴

SEC. 4.—MISCELLANEOUS OFFENCES

Plotting to marry a young gentleman to a woman of low character is indictable as a conspiracy, especially if he is made drunk.⁵

Persuading paupers to marry in order that the female pauper may gain a settlement in the husband's parish, is not indictable as a conspiracy.⁶ A conspiracy to seduce is indictable ; see *ante*, p. 474.

As to killing an adulterer or an adulteress, see p. 478.

¹ As to burden of proof that prisoner had not heard of first spouse's death, see *R. v. Curgenven* (1865), L. R., 1 C. C. R., 1 ; *R. v. Jones* (1883), 11 Q. B. D., 118.

² *R. v. Tolson* (1889), 23 Q. B. D., 168.

³ *R. v. Brawn* (1843), 1 C. & K., 144.

⁴ 1 Hale, 693, and see books on Evidence. If the marriage with the first wife is *prima facie* proved invalid, she can then be called as a witness ; *R. v. Ayley* (1881), 15 Cox C. C., 328.

⁵ *R. v. Thorp* (1695), 5 Mod., 218-224 ; *R. v. Blacket* (1702), 7 Mod. 39 : and see *Seele's case* (1640), Cro. Car., 557 ; *Schreiber v. Lutward* (1781), 2 Dick, 592 ; *R. v. Shreiber or Green* (1781), 3 Doug., 37 (no drunkenness being here suggested).

⁶ *R. v. Seward* (1834), 1 A. & E., 706.

SEC. 5.—CRIMES BETWEEN HUSBAND AND WIFE

Generally any assault by a husband or wife on one another is punishable criminally in the same way as if they had not been husband and wife. In such case where a husband or wife is prosecuted for an assault or summoned to give sureties for the peace against one another, the usual rule that husband and wife cannot give evidence against the other does not apply.¹ Either husband or wife may demand securities of the peace against the other for outrageous treatment.²

If a husband kill his wife, it is murder; but if he surprise her in the very act of committing adultery and kill her, it is but manslaughter; however, if he kill her on mere suspicion it is murder.³

If a wife killed her husband, this used to be petit treason;⁴ but petit treason is now abolished, and it is murder.⁵

Generally, a wife assaulting her husband may be criminally prosecuted. For instance, a married woman under the influence of jealousy poured a quart of boiling water over her husband's face and into one of his ears while he was sleeping. The injury was very grievous, as the man was, for a time, deprived of sight, and frequently, for a time, lost the hearing of one ear. The prisoner was

¹ 4 Hawk., P. C., 7th ed., pp. 432, 433; *Reeve v. Wood* (1864), 5 B. & S., 364. But neither husband nor wife can bring against the other a civil action claiming damages for an assault; *Phillips v. Barnett* (1876), 1 Q. B. D., 436.

² 2 Hawk., P. C., 7th ed., pp. 4, 6 n.

³ *R. v. Kelly* (1848), 2 C. & K., 814; and see *R. v. Smith* (1866), 4 F. & F., 1066. A husband, it is said, is justified in killing the forcible ravisher of his wife, and it is but manslaughter to kill an adulterer taken in the act; *R. v. Manning* (1672), Sir T. Raymond, 212; 1 Hawk. P. C., 7th ed., 172, 174; 1 Hale, P. C., 7th ed., pp. 486, 488.

⁴ 1 Hawk., P. C., 7th ed., 203.

⁵ 9 Geo. IV, c. 31, s. 2.

held rightly convicted of throwing destructive matter with intent to do bodily harm.¹

However, there is one crime that a husband cannot commit against his wife, and that is rape on her, although he can be indicted for sodomy with her; see *ante*, Chap. IV, s. 1 (*b*), pp. 167–173. But a husband procuring his wife to become a prostitute or enter a brothel, or, if under twenty-one, to have unlawful connection, may be prosecuted under the Criminal Law Amendment Act, 1885.² Also a husband knowingly and wilfully infecting his wife with the venereal disease, cannot be convicted criminally, either under a charge of assault or of inflicting grievous bodily harm.³

As to property, formerly, the wife having no separate property, and being with the husband one person in the eye of the law, neither could be convicted of stealing the other's goods.⁴ But now by the Married Women's Property Act, 1882, husband and wife can take criminal proceedings against one another for any offence to property when they are living apart; but if they are living together, then only if the property is taken by a spouse when leaving or about to desert.⁵

Husband or wife administering or supplying to the wife a drug or instrument to procure her miscarriage may be convicted therefor.⁶

¹ *R. v. Crawford* (1845), 1 Den., 100.

² 48 & 49 Vict., c. 69, ss. 2, 3. See a conviction therefore of Louis Allard at the Old Bailey, March 12, 1892, for which a sentence of twenty months' hard labour was given; Sessions Papers, vol. cxv., p. 74, and the Times, 1892, Feb. 23, p. 3; Feb. 27, p. 16; March 14, p. 7.

³ *R. v. Clarence* (1888), 22 Q. B. D., 23; so decided by nine judges to four judges in the Court for the consideration of Crown cases reserved.

⁴ See Roscoe's Criminal Evidence, 11th ed., pp. 640–643.

⁵ 45 & 46 Vict., c. 75, ss. 12 and 16; and in this case they can give evidence against each other, 47 & 48 Vict., c. 14.

⁶ 24 & 25 Vict., c. 100, ss. 58, 59; and see Books on Criminal Law and Practice.

Such criminal proceedings are, however, limited to what is necessary for the protection of the person or the property, and neither husband nor wife could indict the other and institute criminal proceedings for libel.¹

SEC. 6.—RAPE²

Rape is the offence of having unlawful and carnal knowledge³ of a woman by force, and against her will. It must be proved that the woman did not consent at the time; but if not, it is no excuse that she consented after the fact, or that she was an immoral woman, for she is still under the protection of the law, and may not be forced. Intercourse with a woman dead drunk, or an idiot incapable of consenting, has been held to be rape; and it is now provided by the Criminal Law Amendment Act, 1885, that having intercourse with a married woman by personating her husband is rape.⁴ The same Act provided that intercourse with an idiot woman, under circumstances not amounting to rape, is a misdemeanour, punishable by two years' imprisonment.⁵

A boy under fourteen cannot be convicted of rape;⁶ also a husband cannot be convicted of a rape on his wife, although he may be convicted of aiding and abetting another person to commit rape on his wife.⁷

¹ *R. v. Lord Mayor of London* (1886), 16 Q. B. D., 772.

² See 1 Hawk., P. C., 7th ed., pp. 306, 308; 1 Hale, P. C., p. 636; Roscoe, 11th ed., pp. 847, 858.

³ Carnal knowledge is defined by 24 & 25 Vict., c. 100, s. 63; and see *R. v. Lines* (1844), 1 C. & K., 393; *R. v. M'Rue* (1838), 8 Car. & P., 641; *R. v. Hughes* (1841), 9 C. & P., 752.

⁴ 48 & 49 Vict., c. 69, s. 4.

⁵ *Ib.*, s. 5.

⁶ See *ante*, Chap. XIV, p. 467.

⁷ See Chap. IV, pp. 167-173, and p. 479; and now under the Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, ss. 2, 3, of procuring his wife, see p. 479.

Also, a woman cannot be convicted of committing rape on a man.¹

SEC. 7.—PROTECTION FOR YOUNG PERSONS ²

The Criminal Law Amendment Act, 1885, raised the age up to which young females are protected from seduction, the effect of the statute being to enact that if the prisoner has had intercourse with a young girl under the age, the fact that she consented is no defence; if she did not consent, the prisoner can, of course, be prosecuted for rape.

The age for consent to abduction is eighteen; and the taking, or aiding in taking, a girl under eighteen, for an immoral purpose, out of the possession and against the will of her father and mother, or other person having lawful charge of her, is a misdemeanour, and punishable with two years' imprisonment; but it is a good defence that the prisoner had reasonable cause to believe that the girl was over eighteen.³ If the girl is under sixteen, the law is more stringent. As to abduction, see *ante*, s. 2, pp. 474, 475.

Defilement of a girl under thirteen is felony, punishable with a maximum term of penal servitude for life; but if the *prisoner* is under sixteen, the Court, instead of imprisoning, may order him to be whipped, and sent to a reformatory.⁴

Defilement of a girl under sixteen is a misdemeanour punishable with two years' imprisonment; but it is a defence that the prisoner had reasonable cause to believe

¹ Taylor's Medical Jurisprudence, 2nd ed., vol. ii., p. 471.

² 48 & 49 Vict., c. 69; and see Mead and Bodkin's Criminal Law Amendment Act, 1885.

³ S. 7.

⁴ S. 4.

the girl was over sixteen ; and the prosecution must be commenced within three months after the commission of the offence. It is said in the text-books that if the girl under sixteen incites the prisoner to the offence, and submits to it, she too is guilty of an offence.¹

Procuring a girl under twenty-one, not a prostitute or immoral character, to have immoral intercourse with any other person, is a misdemeanour punishable with two years' imprisonment ; but for a prosecution under these sections of the Act there must be corroborative evidence.²

As regards indecent assaults, if the girl is under thirteen, consent is no defence.³

The recent Betting and Loans Infants Act, 1892, constitutes the sending of letters or circulars, etc., to an infant, inviting him to bet or borrow money, a misdemeanour, punishable, on indictment, by three months' imprisonment, or £100 fine, or both ; or, on summary conviction, by imprisonment for one month, or £20 fine, or both.⁴

¹ S. 5.

² 43 & 44 Vict., c. 45, s. 2.

³ Ss. 2 and 3.

55 Vict., c. 4.

CHAPTER XVI

MODERN ROMAN CATHOLIC CANON LAW ¹

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¹ The Canon Law is not legally binding in the British Dominions, or (it is believed) in any other country, But Roman Catholics consider it morally binding on them. It is the law of their Church ; no Roman Catholic priest would dare to marry persons in violation of its rules ; and if a Roman Catholic layman deceives or ever persuades a Roman Catholic priest to marry him in violation of the Canon Law, or elects to marry civilly, or in a Protestant church, that is a matter between his own conscience and his fear of spiritual censures ; see *post*, p. 494. The Canon Law is also historically interesting to Protestants as being, at all events to some extent, the basis of the matrimonial law of England and Scotland ; see *ante*, Chap. I, and *post*, Chap. XVIII, pp. 534, 552.

SEC. 1.—INDISSOLUBILITY OF MARRIAGE AND LAW

By the doctrine of the Roman Catholic Church, marriage is indissoluble ; and no divorce, no misconduct of either party, will authorise a remarriage.¹ The divorce known to the Canon Law is divorce *a mensa et thoro*, which only allows the parties to live separate, and does not dissolve the *vinculum*.

The only exception to the indissolubility of a valid marriage by any *post facto* act is, that it being admitted by the Canon Law that a marriage between two *infides* is valid, that a marriage between a Catholic and an *infidelis* is invalid, that a marriage between a Catholic and a heretic is valid, though unlawful ; yet, if an *infidelis* married to an *infidelis* becomes a Catholic, and the other spouse refuses to be converted, or if in a marriage between two Catholics one of them becomes an *infidelis*, then the marriage between the Catholic and the obstinate *infidelis* is *dissolved*, and not only can the *fidelis* remarry, or take orders, but also the *infidelis* can, either before or after, or without conversion, remarry.² For taking orders or religious profession does not destroy a previous marriage.³

The Canon Law, however, recognised many "impediments" to marriage, rendering a marriage *de facto* solemnised invalid, and for these a decree of nullity could be obtained declaring the marriage void ;⁴ and it was

¹ See Sanchez, bk. x., disp. 2, where the authorities are collected. But this doctrine was only arrived at after considerable hesitation and a great difference of opinion among the Fathers. See First Report of Commission on Divorce, 1852-53 [1604], p. 5, n. (4) ; and Bishop Cozens' argument in the *Duke of Norfolk's* case (1700), 13 St. Tr., 1283, p. 1332 ; and see App. 2, p. 577.

² Sanchez, bk. vii., disp. 71-77 ; and see pp. 23, 493.

³ *Ib.*, disp. 38 ; and see *post*, p. 498.

⁴ *Ib.*, bk. vii.

alleged by the Reformers that it was the practice of the Roman Catholic Church to vexatiously multiply impediments to marriage, in order to gain fees by granting dispensations.¹ Instances of each of these impediments are given below, and in doing this the author has excluded old and fanciful instances, and selected only from cases arising and decided in actual practice during the last twenty years. The Canon Law of the Roman Catholic Church is that "no decree of nullity pronounced in any but a Catholic Court is recognised by the Catholic Church. . . . The decree of nullity for impotence, or for any other cause, pronounced by any tribunal whatsoever external to the Catholic Church, has no validity within it, and therefore no priest could act upon such decree."²

There seems to be no canonical reason why a Roman Catholic should not avail himself of a decree not merely of nullity, but also of dissolution of marriage, from the High Court (say, *e.g.*, for his wife's adultery), and remarry thereon, if he has, previous to remarriage, obtained a decree of nullity from his own Spiritual Court. Neither, would it appear, does the fact that he has previously obtained a decree, not merely of nullity, but even for dissolution of marriage (say, *e.g.*, for adultery), from the High Court, at all debar him from obtaining a decree of nullity from his own Spiritual Court. In this way a decree for dissolution of marriage may become practically useful to a Roman Catholic.³

¹ Report of Commissioners on Divorce, 1852-53 [1604], s. 7; 32 Hen. VIII, c. 38; 1 Eliz., c. 1; and see *post*, on Dispensations, p. 512.

² Kindly communicated to the author by His Eminence Cardinal Manning, Archbishop of Westminster, through H. N. Bayley, 20th August 1891.

³ And see *post*, pp. 496, 499, 500, 589, 590.

The *fontes juris* authorities of the Canonical Jurisprudence, are the Corpus Juris Canonici,¹ the Decreta Authentica,² the decisions of the Roman Catholic Ecclesiastical Courts as reported in the books of the Rota,¹ and the Acta Sanctæ Sedis.³ The Analecta Juris Pontifici,⁴ the text writers, whether Canonists or Theologians, such as Sanchez,⁵ Gury,⁶ Billuart,⁷ Liguori.⁸

Among more modern books may be instanced Craisson, Manuale Totius Juris Canonici; Ferrari, Summa Institutionum Canoniarum; Elements of Ecclesiastical Law, by S. B. Smith, D.D. (Benziger: New York 1882).

SEC. 2.—JURISDICTION AND PROCEDURE

“All questions *de sponsalibus vel de nullitate matrimonie, vel de separatione quoad thorum et habitationem*, belong exclusively to the Ecclesiastical Court.”⁹ “By Canon Law, the bishop in whose diocese the husband has a domicil is the proper judge of any matrimonial

¹ For explanation of its composition, date, and contents, see Encyclopædia Britannica.

² Bulls, etc., emanating from the Papacy, and from time to time altering procedure.

³ An official periodical containing publication of the Propaganda, recording in Latin official proceedings and litigation at Rome since 1865 down to date.

⁴ A more popular treatise—a periodical work beginning from 1855 down to date.

⁵ De Matrimonio, by T. Sanchez of Cordova, Jesuit (Lyons, 1739), a book of the greatest authority, continually cited in the more recent litigation reported in the Acta Sanctæ Sedis.

⁶ Compendium of Moral Theology, an excellent handbook of Catholic doctrine, in one volume, giving reference to all the authorities.

⁷ Billuart, Charles René, Cursus Theologiæ, after S. Thomas Aquinas.

⁸ S. Alphonso Mariâ de Liguori, Praxis Confesarie; and see Migne, Jacques Paul's, Collection of Theological Writers.

⁹ For the supreme power delegated by the Pope to the Congregation of Cardinals, see Acta, vol. x., App. III, pp. 492-503.

case. If the parties had previously separated by mutual consent or mutual fault, the proper judge is the diocesan of the party against whom the action is moved; if the fault of separation lies on one side, the diocesan of the abandoned party must take the case in hand."¹ "The judge must always be an Ecclesiastical judge," and there is always an appeal to Rome, when "the case would be referred either to the Cardinal-Vicar or to the Sacred Congregation of the Council, or to the Auditorium of the Sacred Palace, or to a Congregation of Cardinals specially appointed."¹

As to procedure, "the trial must be conducted under pain of nullity according to the rules laid down by the Canon Law. These laws have been somewhat modified since the days of Sanchez (1739). . . . The general principles are laid down by Benedict XIV in his constitution, "Dei Miseratione," of November 3, 1741. This constitution regards trials outside Rome and in Rome itself. . . . A case of nullity would not be decided by the first judgment so as to leave the parties free to remarry. The 'defensor matrimonii,' who is always appointed by the Court, *must* lodge an appeal for a fresh hearing. Only when the second judgment conformable to the first has passed unchallenged, may the parties be considered free."¹

And if the procedure and formalities prescribed by the Canons and the Bull "Dei Miseratione" are not substantially observed, the proceedings are invalid and the judgment null; and among the most important of these formalities is the continual intervention of the defensor; if that is lacking, the proceedings do not become ratified and validated by his subsequent appearance, but only by

¹ Kindly communicated to the author by J. M'Intyre, secretary to the Roman Catholic Bishop of Birmingham; the Bull "Dei Miseratione" is reprinted in *Acta*, vol. iv., App. IX, pp. 346-352.

a dispensation from the Pope.¹ And a custom to disregard the obligations of the constitution, "Dei Miseratione," requiring the cause to be twice heard, is invalid.²

The more modern procedure was again regulated by an instruction issued by the Congregation, August 22, 1840. By this order the bishops are directed to conform to the Canon and the "Dei Miseratione." The proceedings are, with some exceptions, to be conducted in Latin; these exceptions include the examination of witnesses and report of medical inspectors. The hearing must be always before the bishop or before his official specially appointed. The defensor must be always cited, and given notice of applications, and copies of all documents. The petitioner, the *septima manus* of relations, neighbours, and other witnesses, but not the confessor, are to be examined; but in private, and without the presence or knowledge of the other party except the defensor. Then publication is decreed. Next, the evidence for defence must be given. After the evidence is closed there follows argument and sentence. After the sentence the defensor must appeal to another judge, who will again go through the case.³

A further lengthy explanation of canonical procedure in matrimonial causes was issued in June 20, 1883, by the Holy Inquisition.⁴

¹ See an American case brought before the Rota, September 24, 1864, Acta, vol. i., pp. 411-421.

² See a resolution of December 15, 1877, Acta, vol. x., pp. 504-509.

³ See a copy of this instruction in Acta, vol. i., App. XIV, pp. 439-444; and see further instruction as to evidence issued, August 21, 1870, in Acta, vol. vi., App. IX, pp. 442-446; and a case on evidence, March 24, 1871, Acta, vol. vi., pp. 461-468; and see also a case as to the necessity of the defensor being present, May 19, 1888, Acta, vol. xxi., pp. 162-181 and 593-619. The procedure in nullity for impotence is given *post*, pp. 503, 504.

⁴ Acta, vol. xviii., pp. 344-386.

An account of the Roman Catholic Courts in practice exercising jurisdiction may be found in the evidence before the Committee of Privileges, given by Bishop (afterwards Cardinal) Wiseman, who was then the Co-adjutor and Ecclesiastical Judge for the central part of England. He states that cases came before him, not merely contentiously, but also consultatively and penitentially.¹ But this evidence was given prior to the re-establishment of the Roman Catholic Hierarchy by Papal Bull, September 29, 1851.

A case may also be heard *æconomice* without advocates when the parties are poor, the Court hearing on one side the defensor, and on the other a Canonist and a Theologian.²

In England suits are so rare, about one in three years, that the Court is not organised, and there are no advocates. The appeal is in every case direct to Rome, and the bishop or archbishop always sends the sentence and evidence for confirmation.

SEC. 3.—GROUNDS FOR NULLITY, WITH MODERN INSTANCES

(a) *General*

The Canonists have reckoned fourteen impediments that destroy and annul any subsequent marriage, each being what is described as *impedimentum dirimens*, which they put together in the following old hexameters:—

“Error, conditio, votum, cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Si sis affinis, si forte coire nequibis,
Si parochi et duplicis desit præsentia testis
Rupta sit mulier, parti nec reddita tutæ
Hæc facienda vetant connubia, facta retractunt.”

¹ *The Sussex Peerage* case (1844), 11 Cl. & F., 85, pp. 117–134 and 764–767.

² See Acta, vol. i., p. 259, n.

But none of these, it is believed, except *cultus disparitas* (see pp. 23, 484, 493), occurring subsequent to a marriage, will suffice of themselves to annul a previous marriage. These grounds will be treated *seriatim* in order.

(b) *Mistake or Fraud (Error)*

A mistake in the person annuls a marriage ; that is to say, when a person intending to marry Agnes finds that in fact he has married Julia. But error in the "quality" of the person rarely annuls the marriage, although in some case an error of quality will amount to an error *de personâ*.

The following case will explain :—

Seius, a Greek, enlisted as a volunteer in the Russo-Turkish War. He was billeted in the house of Titus, a Greek Catholic, and fell in love with his daughter, Caia, aged fifteen. Seius represented he was of noble birth, very wealthy, and of good moral character ; and Titus, although he made some inquiries at a reference given by Seius, believing these representations, allowed him to marry Caia, which otherwise he would not have done unless he believed the representations. The marriage took place, and the representations turned out wholly false, because Seius was of bourgeois extraction, had very small means, and was of bad character, as was proved by his infecting Caia with a disease. A few months after marriage he deserted his wife Caia, and married again. Caia sued for nullity on account of error, which was refused, as it was only *error de qualitate*, not *error de personâ*.¹

¹ Acta, vol. i., pp. 257-266, December 29, 1862 ; and see *ib.*, App. X, pp. 371-377, at *error personæ et error qualitatis*, where the doctrine is discussed.

(c) Conditio

When consent to marriage is obtained under a false condition, such marriage may be declared void.

Livius, the son of Horatius, a very rich Greek, fell in love with Caia, a poor Catholic girl. Horatius brought Caia into his house to act as a servant, but Livius became more and more in love with Caia, who was very beautiful, and as Horatius opposed the marriage, sexual intercourse ensued. Horatius threatened to send his son away to Africa. Livius, to keep possession of Caia and avoid Horatius' anger, devised with Caia and N. a scheme whereby Caia should be married to N., a servant who, in consideration of being paid by Livius a month's stipend, was instantly to hand over Caia to Livius. The marriage between Caia and N. took place in church, and immediately afterwards Livius took Caia away to Rome, where he cohabited for years with her, and issue was born, who were brought up as Livius' children. Caia and N. never cohabited or even saw one another since the celebration of the marriage. At last Livius wished to legalise his connection with Caia, and for that purpose to have her marriage with N. declared null. The Court declared nullity on the two grounds of *conditio*, and also that there was no real consent to the marriage.¹

*(d) Votum*²

A solemn vow of chastity on entering a religious order annuls any subsequent marriage, but a simple vow of chastity does not. The Pope can dispense with either.³

¹ August 29, 1868 ; Acta, vol. iv., pp. 65-74.

² See *post*, Ordo, p. 498.

³ Gury, Tractatus de Matrimonio, Caput 6, Articulus 1, 4 ; Articulus 2, sec. 2, punctum 2. There are no cases on this point reported in the Acta ; but see Instructions, vol. xviii., p. 368.

(e) *Consanguinity (Cognatio)*

Relationship up to the fourth degree creates a *diriment impediment*; and on the relationship being properly proved, and its being further proved that no dispensation was obtained, the complainant will be absolutely entitled to a decree of nullity.¹ The degrees of consanguinity are given in the tree of relationship in the end of *Corpus Juris Canonici*; and, besides, all the ascending and descending line includes collaterally third cousins. Degrees of canonical relationship in the ascending and descending line are counted like as civil law, but in the collateral degree they are counted as related to each other in the same degree that they are removed from the common ancestor. For instance, the brothers and sisters of P. being removed in the first degree from the common ancestors, are related in the first degree to P. In the unequal collateral degree it is counted according to the distance of the more remote from the common ancestor. For instance, P. and the daughter of his great-greatuncle are related unequally and collaterally, therefore the more remote must be taken. P. is the more remote from the common ancestor and great-great-grandfather, to whom he is related in the fourth degree, therefore they are related in the fourth degree.

Spiritual Relationship also nullifies marriage. This is constituted by being godfather or godmother to a child, and prevents marriages, not merely between the child and its godparents, but also between the godparents themselves

¹ See a case, June 8, 1889, *Acta*, vol. xxii., pp. 220-237, and August 13, 1870, *Acta*, vol. vi., pp. 101-108, where it was laid down that the Court will give credit to baptismal and marriage registers in proof of relationship till contradicted; and see, further, the Instruction issued by the Inquisition, June 20, 1883, as proof and evidence in this case, *Acta*, vol. xviii., pp. 352-354, 376, 377.

and between a godparent and the child's father and mother.

So in a certain case Nicolæus promised Anna, the wife of Joseph, who was ill at Rome, to be godfather to Siricas her son. Nicolæus, not being able to be personally present, asked Hyppolitus to take his place, who consented. Soon after, Anna's husband died, and Nicolæus married the widow. The marriage was declared null and void.¹

(f) *Crimen*

Adultery or homicide of a spouse committed by conspiracy against a former spouse prevents any valid marriage between the criminals. As regards the adultery, it is necessary that it should be with regard to a valid marriage, known to both parties, and the adultery must be fully consummated and accompanied with a *promise of marriage* after the death of the injured spouse. As regards homicide, the spouse must be actually killed, there must be a *joint* conspiracy, and the homicide must be committed with intent to intermarry. Under these conditions previous homicide or adultery annul a subsequent marriage between the guilty parties.²

(g) *Mixed Marriages (Cultus disparitas)*

That is to say, a marriage between a person baptized and an unbeliever unbaptized is void ; this does not apply to mere heretics.³ But mixed marriages between Roman Catholics and heretics are generally forbidden lest the Roman Catholic spouse might be converted, although if

¹ June 11, 1881, Acta, vol. xiv., pp. 411-421.

² Gury, Tractatus de Matrimonio, Caput vi., Articulus ii., sec. 2, punctum 6. There are no cases on this point reported in the Acta, but see vol. vi., p. 107, n.

³ Gury, Tractatus de Matrimonio, Caput 6, Articulus 2, sec. 2, punctum 7 ; and see *ante*, pp. 23, 484, as to a spouse subsequently becoming *infidelis*.

they take place they are valid. But upon conditions guarding against such conversion to heresy, and with a view to the conversion of the heretic, and further with a stipulation that all the issue should be brought up Catholics, they are sometimes allowed.¹

No priest would marry a Roman Catholic to a non-Catholic without a dispensation. In England a priest's presence is not essential for the marriage of a Roman Catholic (see *post*, p. 506); but if a Roman Catholic is married by a registrar or Protestant minister the marriage is "clandestine," though canonically valid and yet divorceable, see pp. 499, 500, 590.

(h) Consent and Force (Vis et Metus)

Consent.—When it is said that marriage is constituted by the consent of the parties, it is meant that it must be a free and willing consent, not compelled by fear, force, or duress; and a marriage so brought about is null and void. The force and coercion referred to as obtaining an unwilling consent, may be either actual force and fear or moral force and pressure. And in considering their effect, the person on whom they are exercised must be reckoned, whether a young man or a girl or an old man. The party impugning the marriage must show that the force, actual or moral, must be such and sufficient as would have produced that effect on an ordinary man or girl.

And a marriage brought about by such force and coercion does not become, at all events since the Council of Trent, validated by subsequent cohabitation, even although accompanied with birth of issue.²

¹ See Cardinal Antonelli's Instructions, dated Nov. 15, 1858, *Acta*, vol. vi., pp. 456-460; and as to mixed marriages, see also a declaration by the Inquisition, *Acta*, vol. xxiii., pp. 700-703. For a copy of the dispensation now in use for a mixed marriage, see *post*, App. 3.

² *Acta*, vol. ii., p. 20; and see generally as to evidence and proof of

How much the force, whether actual or moral, must be, is best shown by the instances following:—A French girl, Caia, who had lost her father, was put to a girls' school, but from the age of twelve showed signs of weakness of intellect. Her mother, thinking after medical advice that her daughter's health might be thereby improved, wished to marry her to Titus, a wealthy, stupid, elderly debauchee. Caia strongly objected to the marriage, and said she would never marry him, avoided him as much as she could, and when he asked her, said she would consider it. In order to escape the marriage she ran away to Paris, but, was brought back crying. The mother and a cousin pressed her by prayers and threats to marry Titus, in particular saying that if not they would shut her up in a distant and remote house. On the day of the wedding, being brought with her relations to the bridegroom's house, she several times said she would not marry Titus, and would say no at the ceremony. At the civil ceremony before the Mayor she asked the official if she could then say "no" on being asked if she consented, and that official by mistake said she could not. After this, at the ceremony, fixing her eyes on her mother, she said "yes." At the religious ceremony she stopped at the door of the church, and her cousin pushed her on, and then the religious ceremony took place. The marriage was declared null.¹

And *metus reverentialis*, the filial respect when the parent puts pressure on the child by threats, cruelty, or importunity to marry, is a frequent cause of nullity. In a recent case, Aloysia, aged eighteen, had married Ernest,

the impediment of *vis* and *metus*, Instruction, issued June 20, 1883, by the Holy Inquisition, Acta, vol. xviii., pp. 356-359, 379-381; and see *post*, pp. 505, 506, 508.

¹ June 10, 1865, Acta, vol. ii., pp. 6-20.

aged fifty, under strong pressure by her father, an official of overbearing temper. The marriage was very unhappy, and the wife for some time became a lunatic, and was in the madhouse at Ivry. She recovered and went into a convent. Then after her father's death she left the convent, and taking advantage of M. Naquet's divorce law, recently passed, got a civil divorce and remarried Geoffrey, a soldier. Then she applied for a nullity, alleging the impediment of *metus*, and the marriage was declared null by the Ecclesiastical Court at Paris, and the sentence affirmed by the Congregation of Cardinals at Rome.¹

And in another case where a fraudulent priest had got up a marriage, and himself celebrated it at midnight, in order to prevent his own nephew marrying the woman, and the husband and wife never cohabitated, nullity was granted.²

And again, a stepmother, Elisa, who was a strong woman and a public gymnast in Egypt, by threats made her stepdaughter, Adelia, aged fourteen, marry a man of forty, Peter, by threatening her, and taking her to the church at night. Adelia went off into convulsions after the ceremony, and was ill for several days. A civil separation followed, and Peter getting all her property into his hands, spent it. The marriage was declared null although twenty years had elapsed, and there was some evidence of consummation.³

¹ May 4, 1889, *Acta*, vol. xxii., pp. 85-103. This case shows that the fact that the complainant has previously obtained a civil divorce and remarried on it, does not stop such complainant from suing for nullity before the Ecclesiastical tribunal. As to *metus reverentialis*, which seems a very frequent ground for nullity, see *Acta*, vol. viii., pp. 577-593.

² April 17, 1869, *Acta*, vol. iv., pp. 513-522.

³ Feb. 22, 1890, *Acta*, vol. xxiii., pp. 23-40.

Also if actual armed military force is employed to compel the marriage, it will be void. If there is some just and lawful reason for using force it will be valid, but not if the party is thrown into gaol and to get out he marries.¹

In this, Aloysius, a rough young Italian farmer, made love to Anna, and in forty days, having had connection with her, agreed to marry, and the banns were put up. Then discovering that Anna was five months gone in pregnancy by another man, he breaks off the match. He was arrested by the Carabineers and brought before the civil officials, who threatened him to make him marry; and being afraid he consented, whereupon he was instantly taken by force with the Carabineers to the church and married, and then with the bride Anna brought back to a house her parents had assigned to them. They slept together that night; there was continual quarrels during the two months' cohabitation, when Anna having been delivered of a child, Aloysius absconded. The marriage was declared void.²

But it must be proved that the compulsion was inflicted with a view to, and the fear must be felt as a motive towards, entering into the marriage.

Count Antony, aged twenty-two, had married in 1865 Countess Anna, also twenty-two. They lived fairly happily together for five years, when the Countess eloped to Paris with her paramour. The Count got a civil divorce, and they never again cohabitated. Then in 1889, the parents of both parties being dead, the Count sued for nullity. Considerable evidence was brought forward to show the very harsh and overbearing conduct of the Count's father, threatening to disinherit him; but it was not proved that the father had applied pressure

¹ Dec. 18, 1869, *Acta*, vol. v., p. 348.

² *Ib.*, p. 348.

towards, and tried to force on this particular marriage, so nullity was refused.¹

(i) *Ordo*

Orders validly assumed annul any subsequent marriage.²

(j) *Ligamen*

A previous tie, either of marriage or *sponsalia*, creates an impediment.

Sponsalia. — A question as to the impediment of *sponsalia* usually arises from the party alleged to be bound wishing to marry; whereof the party alleging *sponsalia* endeavours, by instituting a suit, to stop the marriage, which is inhibited at once until the Court is certified, *destatu libero*, of the party alleged to be bound.

A mere vague promise of marriage does not constitute *sponsalia*. The *sponsalia* must be proved by a clear promise and repromise. *Sponsalia* will often be presumed from sexual intercourse with a woman of virtuous conduct; but indifference on the part of the parents to their daughter's seduction will be evidence rebutting such presumption.³ Even secret *sponsalia* creates an impediment (see *post*, p. 501).

Marriage. — As to previous tie of marriage, this exists unless it has been declared null by the sentence of a Canonical Court, or put an end to by the death of the party. As to the termination of the first marriage by

¹ May 10, 1890, Acta, vol. xxiii., pp. 140-154.

² Gury, Tractatus de Matrimonio, Caput 6, Articulus 2, sec. 2, punctum 2; there are no recent cases on this point reported in the Acta, but see Instruction, vol. xviii., p. 368.

³ Jan. 28, 1865, Acta, vol. ii., pp. 142-147; April 29, 1871, Acta, vol. vi., pp. 519-526, vol. viii., p. 316.

death, the death must be either proved or presumed from long absence.¹ In some cases it is incumbent on those wishing to be married to prove that they are free from any previous tie.²

Civil Divorce.—As to the remarriage of persons whose marriage had been declared null, and dissolved by a civil tribunal, the Canon Law and practice of the Catholic Courts must be closely examined. If the marriage has been declared null by the Civil Court on account of an impediment known to the Canon Law, the Canonical Court somewhat encourages a previous reference to the Civil Court, and the proceedings in the Civil Court should be given in evidence in the Canonical Court. If the Civil Court, however, has dissolved the marriage on account of reasons not known to the Canon Law, as, *e.g.*, adultery, the Canonical Court eyes suspiciously any previous reference to the Civil Court; indeed it is said, in part of the Instruction, that in this case the parties are in some degree estopped from proceeding for nullity in the Canonical Court, but in practice a civil divorce for such a ground frequently precedes a Canonical suit for nullity.

But if the prior marriage has been contracted heretically, and not before a Catholic priest, the Canonical Court will inquire closely into its validity, to see, for instance, if the parties have been baptized.³

But the most recent pronouncement of the Holy

¹ See Instructions by S. Congregation and by S. Inquisition, Acta, vol. vi., pp. 436-446; and see further Instruction by the Inquisition, June 20, 1883, Acta, vol. xviii., pp. 360-364, 382-386.

² See the most recent Instruction, August 29, 1890, Acta, vol. xxiii., pp. 189-192, quoted *post*, p. 590.

³ Instructions by the Inquisition, June 20, 1883, Acta, vol. xviii., pp. 360-364, 382-386; for a case where the petitioner for nullity had obtained previously a civil divorce, see *ante* (h), p. 496.

Inquisition rather tends to relax this stringency, and extend greater favour towards the remarriage of persons divorced for adultery. For it lays down, if two heretics marry according to their own rites, or a Catholic and heretic, or two Catholics marry according to heretical or civil rites, under a civil system which admits divorce, even although they may have superadded subsequently to the civil or heretical rite a Catholic ceremony, yet, because they married under a system admitting divorce for adultery, such civil or heretical marriage is on that account void, and the parties when civilly divorced may be properly remarried by a Catholic priest.¹

(k) *Publica honestas*

The impediment of *publica honestas* arises from previous marriage or *sponsalia* with a relation of either party. It frequently coexists with the impediment of affinity, as explained *post*, pp. 502, 503. The impediment of *publica honestas* arising from valid *sponsalia* must be distinguished from that of *ligamen* arising from *sponsalia* or marriage, for in *ligamen* it is alleged that the *sponsalia* or marriage are still subsisting (see *ante*, pp. 498, 499, *Ligamen*); but as regards the impediment of public honesty it is legally immaterial whether or not the *sponsalia* have been put an end to, whether by mutual consent or death the impediment still exists, unless removed by dispensation. The impediment extends only to those in the first degree of consanguinity, *i.e.* parents and children, brothers and sisters of persons with whom *sponsalia* existed.² As regards a marriage, the impediment arises from a marriage that may be invalid from lack of consummation,

¹ See Acta, vol. xxiii., pp. 700-703, issued in the part for June 1891.

² Feb. 28, 1885, Acta, vol. xviii., pp. 210-219.

but not from a marriage invalid from want of consent, or from a civil marriage (see *post*, p. 506); and when it arises from marriage it extends to fourth degree. As regards *sponsalia*, the impediment arises, not merely from public, but also from private and secret *sponsalia*, and when arising from *sponsalia* only extends to the first degree.¹ As to dispensations from the impediment of public honesty, see *post*, p. 514.

Public honesty undispensed with was one of the impediments to the marriage of Henry VIII and Catharine of Arragon (see *post*, App. 5).

(l) Affinity

Affinity may be defined as the tie between persons whose relations have had sexual intercourse.

The tables of the persons whose affinity creates an impediment is set out in the end and Appendix to the first volume of *Corpus Juris Canonici*. At the present day only the first genus of affinity creates an impediment extending to the fourth degree, ascending or descending. And in considering affinity, besides the *genus* and *gradus*, the *linea*, whether *recta collateralis* or *obliqua*, must be counted.

The first *genus* of affinity includes, as regards a man, his wife's sister and the surviving widow of a deceased brother of his wife, and their relations by consanguinity to the fourth *degree*, ascending, descending, and collateral; and correspondingly as regards a woman.

So if Caius, who is related to me within fourth degree of consanguinity, has intercourse with Agnes, Agnes

¹ *Acta*, vol. ii., App. IX, where reference is to a treatise *De Dispensationibus Matrimonialibus*, by Peter Giovine; and see an Instruction issued June 20, 1883, by the Inquisition as to proof and evidence in this impediment, especially as *sponsalia*, *Acta*, vol. xviii., pp. 354-356, 377, 378.

becomes *affinis* to me in the first *genus*, and in the same *degree* as my relation is related to me. Therefore my third cousin being related to me in the fourth degree, his wife is *affinis* to me in the first *genus* and the fourth *degree*. But if Sempronius, who is *affinis* to me in the first *genus*, has intercourse with Lucia, Lucia becomes *affinis* to me in the second genus, so I can marry Lucia. For instance, if my wife had a sister who died leaving a widower, and he remarried and died, I could marry his widow.¹

And, as will be seen, affinity arises, not only by marriage, but by sexual intercourse without marriage, the only difference being that affinity produced by sexual intercourse without marriage creates an impediment up to second degree only, and not to fourth degree, as would be produced by lawful intercourse.² So previous sexual intercourse with the sister or mother of a wife creates an impediment of affinity; but to set up this impediment sexual intercourse must be fully proved, not merely by confession of the party, but by proper witnesses, and mere kissing or lewd touching will not create affinity.³

The impediment of affinity often coexists with the impediment of public honesty, but either may exist without the other; for instance, if I have had sexual intercourse with my wife or with a person engaged to marry me, an impediment of affinity and public honesty

¹ See also *Acta*, vol. ii., App. V, pp. 126-128, App. VII, pp. 190-192, where the *lines* of affinity are set out; and see generally Instructions issued June 20, 1883, by the Holy Inquisition as to proof and evidence in such cases, *Acta*, vol. xviii., pp. 352-354, 376, 377.

² *Acta*, vol. ii., App. V, pp. 126-128; such sexual intercourse once constituted affinity according to the law of England, but now does not; see *ante*, p. 31.

³ See a case where a husband had had previous intercourse with his mother-in-law, May 19, 1888, *Acta*, vol. xxi., pp. 161-181; and another case, June 16, 1888, *ib.*, pp. 261-288; May 22, 1875, *Acta*, vol. viii., pp. 630-643, where the intercourse was with the wife's mother previous to marriage.

arises between me and her relations ; if I have had mere sexual intercourse without marriage or *sponsalia*, there is only the impediment of affinity ; if I have promised to marry a woman but had no carnal intercourse with her, then there arises the impediment of public honesty alone.

Public honesty undispensed with, and affinity which had been dispensed with, were the impediments to the marriage of Henry VIII and Catharine of Arragon ; see *post*, App. 5.

(m) *Impotence*

In cases of impotence, the family doctors of the parties must be called as witnesses, and further, there must be inspection of both parties. This inspection is conducted as follows :—The Court appoints five medical men, to wit, three physicians and two surgeons, either selected by the parties or by the Court itself from the most eminent to be found. The husband will then be inspected by the five doctors in the presence of the judge, the defensor matrimonii, and the chancellor. As for the wife, the judge is to select three midwives, who are to be carefully instructed by two of the doctors, *i.e.* by one physician and one surgeon, as to how they are to examine the wife. The wife is to be taken at a fixed time to the house of some discreet matron, and then to be put into a hot bath of clean water, in which she is to remain forty-five minutes : “ Ut si forte glutino appposito verenda mulieris compressa sint, atque coarctata, ut virgo appareat, id liquesceri possit,” Sanchez, bk. vii., disp. 113, No. 11. The matron and the three midwives are all to be present all the forty-five minutes, and then forthwith to examine whether the wife is *virgo intacta*. The judge, the defensor, and the chancellor are to go to the house and examine each of the midwives separately, for her opinion

as to the wife's virginity, and what signs of consummation or hymen they observed.¹

In a suit by the woman, if the impotence of the man is clearly established by proof of doctors, as well as by that of relations, a physical defect being patent, the woman though not a virgin, and even if she has had sexual intercourse with other men, will be entitled to a decree of nullity.²

There is no necessity for a triennial cohabitation (the rule as to which, belonging to the older law, is now becoming obsolete) if the impotence of the party can be established by clear evidence; such clear evidence may be afforded by the judicial examination and medical inspection of the petitioner, even though the other party alleged to be impotent refuses contumaciously to be inspected or appear.

When there is a doubt as to the impotence being established, but it is proved that there is no consummation, it is the usual practice for the Court to advise a papal *Dispensatio super matrimonio rato et non consummatio* (see *post*, pp. 510-512); but if, as in the case in question, the impotence is clearly established, the Court itself gives sentence, and there is no necessity for a dispensation.³

On giving a decree of nullity for impotence, the Court

¹ See the Instruction of August 22, 1840, in *Acta*, vol. i., App. XIV, pp. 439-444; and see generally an Instruction as to procedure in case of impotence, issued June 20, 1883, by the Inquisition, *Acta*, vol. xviii., pp. 365-368, 386; the procedure follows that described in Sanchez, bk. vii., disp. 113. The bath is sometimes, for good reasons given, omitted; sometimes also the examination is by doctors instead of midwives; but this is disapproved by the Church as immodest; see *Paul and Dionysia* case, June 15, 1890, *Acta*, vol. xxiii., pp. 156-164; but if great skill is required, an inspection by doctors will be ordered, as when it is alleged that the wife is not a woman but an hermaphrodite, *Joannes Cioffoli v. Faustine Mauro*, August 18, 1888, *Acta*, vol. xxi., pp. 480-502.

² *Virginia v. Victorius*, Aug. 9, 1890, *Acta*, vol. xxiii., pp. 465-475.

³ See a case of Jan. 1, 1871, *Acta*, vol. vi., pp. 511-518.

is wont to forbid the party, *e.g.* Caius, declared impotent from marrying again. This prohibition, however, forms only *impedimentum impediens*, not *impedimentum dirimens*. Therefore if Caius does, notwithstanding the prohibition, marry Julia, such second marriage will be *prima facie* valid. But if the second marriage, resulting in issue, proves the Court to have been deceived in declaring the first null on account of impotence, Caius may be compelled, but only with the sentence of the Court, to leave Julia and return to his first wife Lucia; unless the first marriage with Lucia had been dissolved by *Dispensatio super matrimonio rato et non consummato*.¹

But such permission to the person alleged to be impotent may be given, if, in fact, an inspection by doctors he is proved potent, and a second marriage so contracted after permission will be valid.²

(n) *Form by Decree of Council of Trent*

Where the decree Tametsi of the Council of Trent has not been proclaimed, marriage is constituted by mere consent freely exchanged between persons who are by natural and canonical law competent and able to intermarry;³ and further, if two such persons promise to marry in the future, and carnal intercourse follows, consent to a present marriage is thereby constituted by an irrebuttable presumption.⁴

¹ See a case of Jan. 24, 1871, reported, *Acta*, vol. vi., pp. 511-518, and in particular, note, p. 518; and see a curious case where the party to a marriage declared void for impotence had remarried, and the Pope dissolved the first marriage by *dispensatio* in order to validate the second, Jan. 25, 1873, *Acta*, vol. vii., pp. 491-503.

² See an application of Feb. 1, 1868, *Acta*, vol. iv., pp. 198, 199.

³ *Acta*, vol. ii., p. 19; as to what is consent, see *ante* (h), pp. 494-498; and see a case noted under *Conditio*, p. 491.

⁴ Instruction issued from the Propaganda, Jan. 1821, *Acta*, vol. vi., pp. 446-456.

But if consent is given as a mere joke, even in the presence of a priest, it will be void.¹

Where the decree Tametsi of the Council of Trent has been published, the form thereby prescribed must be observed, and in these districts a civil or Protestant marriage is void and mere concubinage, and the children illegitimate.²

The decree Tametsi requires as necessary to the validity of the marriage, that it should be celebrated in the presence of the priest of the parish in which one of the parties is domiciled, or in the presence of a priest delegated by such parish priest, and in the presence of two witnesses; and if not, the marriage will be void on the ground of clandestinity, notwithstanding that it was celebrated *bona fide* by parties intending it to be valid, and that cohabitation attended by birth of issue has followed.³

In England and Scotland the decree Tametsi has not been published,⁴ and therefore marriage by consent being valid, the impediment of form and clandestinity is not

¹ Dec. 14, 1889, Acta, vol. xxii., pp. 529-546.

² Acta, vol. iii., pp. 243-245; and see Instructions issued by the Pœnitentiaria Apostolica, Jan. 15, 1866, Acta, vol. i., App. XVIII, pp. 508-512; as to civil marriages and the answer of the Congregation of Cardinals, Jan. 19, 1889, Acta, vol. xxi., pp. 648-674. However, the children of such marriage may be legitimated; see Acta, vol. xxiii., pp. 332-334, July 12, 1890. A civil marriage does not even constitute an impediment *publicæ honestatis*; see Acta, vol. xiii., p. 126, and *ante*, p. 500, 501.

³ Acta, vol. i., pp. 129-138.

⁴ See the answer of the Congregation, Jan. 19, 1889, Acta, vol. xxi., p. 673; for although in England and Scotland good Catholics, by order of the bishop, marry in the presence of the priest and two witnesses, this is not necessary to validity, and the order of the bishop is merely directory; and no such order by a bishop can affect the publication of the decree, which is above the power of a bishop, and must be settled at Rome. There still exist doubts as to the countries in which the decree Tametsi has been or is by express or implied publication in force. But the marriage of a Roman Catholic in England without a priest would be, although canonically valid, yet clandestine and divorceable; see *ante*, pp. 483, 494, 500.

further discussed. Except that if persons domiciled in a country where the decree is published go into another country where it is not published merely to be married, and they are not domiciled there, their marriage will be invalid.¹

In this case a domiciled Frenchman, Laurentius, fell in love with Agnes, an Irish girl who was living with her parents in France. His parents opposing the marriage, they eloped to England and were there married, returning at once to France. Such a marriage was shown in evidence (see pp. 523, 526, 529) to be void by the law of France, as made by a person under age without the consent of parents, but valid by the law of England. Husband and wife on returning to France did not cohabit. The French Court declared the marriage void, and Laurentius proposed to remarry. The marriage was declared void as a fraud of the decrees of the Council of Trent.²

Marriage by Proxy.—Lastly, it must be said that it is not necessary that the parties or either of them should be personally present in order to contract marriage. For the consent may be interchanged either by letter or a messenger; or there may be an ecclesiastical ceremony by proxy, so long as the proxy is properly constituted, and gives proper consent on behalf of his principal.³

¹ Acta, vol. i., pp. 385–400.

² July 28, 1866, Acta, vol. ii., pp. 385–400; the father of Agnes, through the Archbishop of Dublin, who happened to be at Rome, showed the difficulty he was in, because Agnes being married according to the law of England could not marry any one there; however, notwithstanding strenuous arguments to the contrary, nullity was decreed. Agnes' only remedy would be on Laurentius' remarrying to get an English divorce, when she could remarry in virtue of the divorce by English law, in virtue of the nullity canonically; and see a similar case, *ib.*, App. XII, pp. 434–438.

³ April 7, 1883, Acta, vol. xvi., pp. 10–27; June 14, 1884, vol. xvii., pp. 305–313; and see an American case where a son constituted his father the proxy, Acta, vol. i., pp. 411–421; and as to marriage, see *ante*, p. 22, and *post*, App. 4, pp. 594, 595.

(o) *Abduction (Raptus)*

Previous to the Council of Trent, *Raptus* as a cause of nullity was not to be distinguished from fear and coercion. By that Council it was established that if there had been abduction, no valid marriage could be constituted between the person abducted and the abductor until the person abducted has been brought back into a place free and safe, where she could give an independent and unforced consent. But mere elopement together is not abduction.¹

In one case, where a wife, Agnes, sued for nullity against Sempronius, the facts were as follows:—The complainant's father and mother had lived separate for the mother's fault; and when the present husband wished to marry the complainant, the father refused his consent. The daughter, Agnes, though living with her father, being allowed occasionally to visit her mother, her mother and her governess, who were in league with Sempronius, took her to the seaside, and there brought her to Sempronius' house, from which she could not escape. The next day, having left Sempronius' house, her mother, after telling her that her father would be very angry with her, took her to an inn, which she was not allowed to leave except in company with her governess; but Sempronius came to see her daily. In the inn she stopped under this state of coercion for some time. However, she was able to go out once to confession and once to see a lawyer, who told her there was nothing for her to do except to marry

¹ See Acta, vol. i., pp. 15-24, and App. II, pp. 54-63; vol. xxi., p. 593-619; vol. xxiii., pp. 451-464. Some doubt appears to prevail how far a common flight, preceded by seduction and wheedling, amounts to abduction (see Acta, vol. ix., pp. 519-529, Sept. 2, 1876) in which case, owing to defect of proof, recourse was had to a *Dispensatio super matrimonio*, as to which, see *post*, p. 510.

Sempronius. The governess also told her, by Sempronius' direction, that she must either marry him or she would have to go into a convent. Under these circumstances she consented to marry him, and the ceremony took place, her father being present. But, according to the celebrating priest's evidence, she seemed very sad, and the father stupefied; in fact, as the priest said, it was more like a funeral than a wedding. After that she cohabited four years with Sempronius. But on the first possible occasion she left her husband and ran to her father's house, and by his advice went into a convent. The husband obtained a civil divorce.

Nullity on the ground of abduction was granted, because not merely was there abduction in the first instance, but it never ceased by her being placed *in locum tutum et liberum*, though she did certain free acts; and a marriage so contracted subject to a "public obstacle" is not validated by long cohabitation.¹

In another case, Lazarina, of Marseilles, aged sixteen, eloped with an officer, Baron Alfred, from her convent. They visited several places, and were married, first religiously and then civilly. But the marriage turned out unhappily, and the husband got a full civil divorce. The wife sued for nullity; but it being proved that there was a common arrangement between them to elope, that she ran off from the convent, and that she was, at all events, to some extent returned to a safe and free place, the nullity was refused.² And as to eloping with a nun being still a punishable offence, see *ante*, p. 23, n. 4.

¹ August 27, 1864, Acta, vol. i., pp. 15-24.

² Feb. 16, 1889, Acta, vol. xxi., pp. 593-619, and vol. xxiii., pp. 451-464; but in this case it was admitted that a consent to abduction obtained by fraud and stratagem does not dispose of that impediment; so that abduction may be proved although the woman was willing.

(p) *Dispensatio super matrimonio rato sed non consummato.*

Besides these above enumerated causes of nullity, which are litigated in the ordinary way, and give a right to a declaratory sentence of nullity, the Pope has power, and is wont of his discretion, for good reasons shown, to dispense the parties from and dissolve a marriage which, though valid, has never been consummated.¹ This is entirely different from nullity for impotence, as to which, see *ante*, pp. 503–505.

When it is said that His Holiness grants this of his discretion, it appears that, although not exclusively, yet usually, this is a judicial discretion exercised after a judicial investigation, and on the advice of the tribunal. So when a party applies for a *Dispensatio super matrimonio*, an inquiry before the ordinary ecclesiastical tribunal is ordered, and on its judgment the Pope acts. But often when a suit is originally promoted for nullity, yet if the evidence does not come up to the required point, the tribunal, instead of declaring a nullity, advises a *Dispensatio super matrimonio*.

In fact, in suits for nullity before the Rota, the question is usually propounded in two *dubia*—

1. *An constet de matrimonii nullitate in casu et quatenus negative.*

2. *An consulendum sit SSmo pro dispensatione matrimonii rati et non consummati in casu.*

But a dispensation is not to be recurred to if the evidence is sufficient so that nullity can be declared *judicially* as a matter of right.²

¹ See *passim*, and in particular *Acta*, vol. ix., pp. 303–313, May 13, 1876, where it is laid down that to doubt of the Pope's power in this respect is like sacrilege.

² June 16, 1888, *Acta*, vol. xxi., pp. 261–288.

To obtain such dispensation, not only must there be good cause shown, but non-consummation must be proved pretty thoroughly.¹

Among the good reasons on account of which the Pope will exercise this dispensing power, is pressure that has been put on one of the parties so as to induce such party to enter into the marriage, although such pressure may not be sufficient to give right to a sentence of nullity.²

Other good reasons are that one of the parties suffers from a contagious and disgusting disorder, or that deadly hatred has sprung up between the parties.³

Also, where the wife⁴ or the husband⁵ refuses obstinately marital intercourse.

This dispensation is sometimes granted when non-consummation is proved, but the evidence fails to make out conclusively the respondent's impotence.

Caia, aged seventeen, married Livius, aged twenty-seven; they lived happily, but her health suffered owing to the marriage not being consummated, although she was ignorant of what sexual intercourse was. Her ill-health increased till, by the inspection of doctors, her parents became aware of the reason. Their litigation commenced *æconomice*, but the proceedings were conducted regularly, as prescribed in cases of impotence (see p. 503). The midwives certified she was a virgin, and the doctors that they saw no visible defect, and thought him potens. *Dispensatio super matrimonio* was granted.⁶

¹ Acta, vol. ix., pp. 519-529, Sept. 2, 1876; vol. x., pp. 376-400, April 21, 1877; and see *ib.*, pp. 435-450, 463-473.

² Acta, vol. i., p. 421, Sept. 24, 1864.

³ May 13, 1876, Acta, vol. ix., pp. 293-313.

⁴ May 28, 1870, Acta, vol. v., pp. 551-554; and see Acta, vol. ix., pp. 293-313.

⁵ June 15, 1890, Acta, vol. xxiii., pp. 156-164.

⁶ July 18, 1868, Jan. 23, 1869, Acta, vol. i., pp. 190-197, 374-377; and see *P. v. P.*, where the husband, after wishing to have sodomitical

But although a mathematical certainty of non-consummation is not required, yet it must be some proof of non-consummation, especially when the husband is proved potent; and if consummation is proved, such dispensation will be denied.¹

And in another case, where a Polish widow, Maria, on the death of her first husband, by whom she had three sons, married a soldier, Stanislaus, and she swore to non-consummation, and was shown to be apt, and the medical evidence differed as to her husband, but public rumour held him impotent, a dispensation was granted.²

(q) *Dispensatio matrimonialis*³

Closely connected with impediments of positive law comes the papal power to grant *Dispensatio matrimonialis*,—that is to say, the power, on petition, to remove an impediment which otherwise would have prevented the parties validly intermarrying. The *Dispensatio matrimonialis*, i.e. the permission for subsequent marriage, must be clearly distinguished from *Dispensatio super matrimonio*, that released the parties from a marriage they have already entered into.

The ordinary tribunal for granting dispensations is the Apostolica Dataria, but the Pœnitentiaria also issues dispensations. Both tribunals are considered as the Pope himself. The bishops have a certain limited delegated power of dispensing, but appeal lies from them to the Dataria and Pœnitentiaria.⁴

intercourse with his wife, and treating her with great brutality, expelled her from the house, and, she being found a virgin, the marriage was annulled, March 29, 1890, Acta, vol. xxiii., pp. 81-109; and see another case, *ib.*, pp. 277-298, July 12, 1890.

¹ *Aloisius v. Susanna*, Sept. 6, 1890, Acta, vol. xxiii., pp. 528-551.

² June 8, 1889, Acta, vol. xxii., pp. 262-278.

³ For a copy of a dispensation for a mixed marriage, see *post*, App. 3.

⁴ Acta, vol. vii., p. 430, June 28, 1873.

No defined limitation has ever been placed on the dispensing power of the Pope, though the Holy See has never yet granted, and has always declined to grant, dispensations in the first degree of consanguinity, direct or collateral; as to affinity, see *post*, p. 514. Episcopal dispensations are strictly governed by the limits of the jurisdiction confided to them.¹ A Papal or Episcopal dispensation may, however, be shown to be invalid and null if obtained by fraud or misrepresentation on the part of the petitioner, “per obreptionem vel subreptionem, sive bona sive mala fide.” A dispensation is always presumed to be valid, and the burden of proof of fraud and misrepresentation lies on those impugning the dispensation.¹ What amounts to such fraud and misrepresentation as will avoid a dispensation is a matter repeatedly discussed by the Canonists, and litigated in ecclesiastical tribunals.² If, previous to the dispensation, sexual intercourse, which then was incestuous, has taken place between the parties, a penitentiary clause is usually inserted in the dispensation.³

The usual reasons for which the dispensing power is commonly exercised are, shortly: because of previous sexual intercourse between the parties; because it would otherwise be difficult for one or either party to marry,

¹ *Acta*, vol. vii., pp. 430, 431, June 28, 1873. The missionary bishops in Central Africa have specially extensive powers of granting dispensations, *Acta*, vol. vii., App. V, pp. 301–305. For the dispensing powers granted by the Pope to the Romish Episcopacy in England, see *post*, App. 6.

² *Ib.*; and see Vincentius de Justis, *De Dispensat. matrim.* Sanchez, bk. viii. The divorce of Catherine of Arragon, see 1 St. Tr., 299, depended on the validity of the dispensation which the King’s advocates impugned; see *post*, App. 5.

³ *Ib.*, vol. ii., App. XV, pp. 493–496; but its non-disclosure will not invalidate the dispensation, June 7, 1842, Answer to the Archbishop of Namur, *Acta*, vol. xiii., p. 568; March 27, 1886, *Acta*, vol. xix., pp. 20–32.

or because a quarrel may be thereby appeased. But these reasons are not exclusive of others.¹

As to affinity in the ascending or descending line, a dispensation to marry a stepmother or mother-in-law is never granted. In the collateral line a dispensation in the first degree, *i.e.*, to marry a sister-in-law, is often granted.²

Dispensations from the impediment of public honesty (see p. 500) are to be obtained from the S. Pœnitentiaria for poor persons, and for others from the Dataria Apostolica. If the impediment arises from secret *sponsalia*, the S. Pœnitentiaria is wont to delegate the granting of it to the confessor of the party. If the *sponsalia* were with father, mother, son, or daughter of the party who are related in the first degree in *linea recteâ*, the dispensation is granted more tardily than if the *sponsalia* were with a brother or sister.³

(r) Ratification

If a marriage which is valid in point of form chances to be invalid on account of some obstacle, the question arises whether, after the impediment is removed, it can be ratified by tacit consent without a fresh celebration; and herein a distinction is made between public or manifest and secret impediments; as to the former, the doctors lay down that it requires a fresh celebration of marriage. The chief difficulty arises with regard to the impediment of *vis* and *metus* (see *ante*, p. 494); but it has been several times declared that in this case a fresh celebration is required.⁴

¹ See Acta, vol. ii., App. III, pp. 62-64; and for remoteness of the place as a reason, see also Acta, vol. ix., p. 571, July 8, 1876.

² See Practice of S. Pœnitentiaria explained in Acta, vol. ii., App. V, pp. 126-128, App. VII, pp. 190-192, where the grades of affinity and the procedure for obtaining a dispensation are explained; and see App. 6.

³ See the Practice of S. Pœnitentiaria, explained Acta, vol. ii., App. VIII, pp. 257, 258, and *ib.*, App. XI, pp. 381-383.

⁴ Acta, vol. ii., App. I, pp. 52-56; Acta, vol. xii., pp. 403-422; and see a case decided June 16, 1888, Acta, vol. xxi., pp. 226-236; and see *ante*, p. 494, 509.

CHAPTER XVII

INTERNATIONAL LAW¹

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SEC. 1.—GENERAL

(a) *Definition*

THE subject of this chapter is the validity that the English Law gives to matrimonial acts out of the jurisdiction, and to matrimonial acts done in the jurisdiction which are or might be invalid by some foreign law applicable to one or both of the parties. The converse of this is the view taken by Foreign Law of acts done in England. Unhappily it sometimes happens that by result of the conflict of laws, persons may in one

¹ For authorities on International Law, see Foote, Nelson, and Westlake; on Private International Law, Wharton's Conflict of Laws (Amer.); Dicey on Domicil; Calvo, Le Droit International; Wheaton's International Law (Amer.); and see Piggott on Exterritoriality.

country be held married or legitimate, and in other countries unmarried or illegitimate. This branch of law is sometimes called Private International Law,¹ sometimes comity, sometimes conflict of laws. It may, however, be described as comprising cases where the Court considers whether it is bound to apply its own law *lex fori*, or whether it should ascertain and apply the law of some other country, that other country being usually either the law of the country where "the party" is domiciled, or the law of the country where "the act" is done, *lex loci contractus*.

(b) *Domicil and Nationality*

The tendency of modern jurisprudence has been to minimise the importance of nationality and magnify the importance of domicil. A Court usually inquires where a person is domiciled, not of what nationality he is. Domicil, not nationality, determines personal capacity and liability.²

Domicil has been the object of little or no statutory regulation in any country ; it has been gradually evolved by the Courts on juristic principles, following the writings of the Publicists.

The principles which ascertain domicil are somewhat intricate, and the facts constituting its proof elaborate. It is, therefore, not further the subject of treatment in this work, but the following definitions are given. "Domicil means the place or country which is considered by law to be a person's permanent home."³ Domicil is "that place where a man has his true fixed

¹ Westlake on Private International Law.

² Wharton's Conflict of Laws, chap. i. ; and as to domicil and allegiance, see *Udny v. U.* (1869), L. R., 1 H. L., Sc. & D., 441.

³ Dicey on Domicil ; his book is an elegant treatise of high authority ; see *Udny v. U.* (1869), *ubi sup.*

and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.”¹

Again, “domicil is a residence acquired as a final abode. To constitute it, there must be both residence actual or inchoate, and the non-existence of any intention to make a domicil elsewhere.”²

A wife takes her husband’s domicil and nationality even if the marriage turn out invalid.³

“Foreign” means not English, that is to say, as regards England; Scotland, as well as the British Dominions, outside the United Kingdom are considered as foreign countries.

The English Ecclesiastical Courts had, and therefore the Probate and Divorce Division has, jurisdiction with respect to the marriages of English domicil subjects, wherever such marriage may be celebrated.⁴

SEC. 2.—VALIDITY IN ENGLAND OF MARRIAGES ABROAD

(a) *Form of Marriage*

The general rule is that, as regards the solemnities and form of the marriage, if the marriage is valid by the *lex loci contractus*, it is valid in England. Lord Stowell laid down—

“That the English decisions have established this rule, that a foreign marriage, valid according to the law of the country where celebrated, is good everywhere else; but they have not, *à converso*, established that

¹ Bouvier’s Law Dictionary; and see Burrill’s Law Dictionary.

² Wharton’s International Law.

³ *Harvey v. Farnie* (1882), 8 App. Ca., 43; *Turner v. Thompson* (1888), 13 P. D., 37; and see *ante*, Chap. IV, pp. 165, 166.

⁴ Sir George Hay’s judgment, *Harford v. Morris* (1776), 2 Hag. Con., 423, p. 428; and see *ante*, pp. 223, 224.

marriages of British subjects not good according to the general law of the place where celebrated, are universally, and under all circumstances, to be regarded as invalid in England. It is therefore certainly to be advised that the safest way is always to be married according to the law of the country, for then no question can be raised."¹

So a Sicilian marriage *per verba de præsenti*, which was forbidden as clandestine and punishable, but not invalid by the law of Sicily, was held valid in England.² Also, a marriage at Rome of British subjects, Protestants, before a Roman Catholic priest, where the parties became Roman Catholics merely to be married, and immediately afterwards abjured Roman Catholicism, was held valid.³

Even if persons, including minors, elope to Scotland for the express purpose of evading the English Marriage Acts, and contract marriage in Scotland by a form which would be invalid in England, but is valid in Scotland, the marriage will be valid.⁴

As regards the validity of the form of the marriage, the domicile of the parties is irrelevant and immaterial; it is regulated by the law of the country in which the marriage is solemnised, however short the time the parties may have there previously resided.⁵

Marriages invalid by the *lex loci contractus* have been generally held invalid in England, even although they might be good by the law of England, except in cases where they can be supported on the Doctrine of Extra-

¹ *Ruding v. Smith* (1821), 2 Hag. Con., 371, p. 390; Hubback on Succession, pt. ii., chap. iv., sec. 3, pp. 329-377; Shelford on Marriage and Divorce, chap. ii., pp. 118-153; *Scrimshire v. S.* (1752), 2 Hag. Con., 395, pp. 402, 416, 417.

² *Lady Herbert v. Lord Herbert* (1819), 2 Hag. Con., 263.

³ *Swift v. Kelly* (1835), 3 Knapp P. C., 257, 4 Hag. Ec., 139.

⁴ *Crompton v. Bearcroft* (1767), 2 Hag. Con., 376, n., 444, 445, n. n.; and see Hubback on Succession, p. 331; Shelford on Marriage and Divorce, pp. 107-118.

⁵ See *Simonin v. Mullac* (1860), 2 Sw. & Tr., 67.

territoriality, under the Foreign Marriage Act, 1892, or otherwise.¹

So where two domiciled English subjects, both minors, the husband being eighteen and the wife fifteen years old, eloped to France, and contracted there a clandestine marriage before a Roman Catholic priest, which the Parliament of Paris, on various grounds, considered null and void, it was, because invalid in France, as well as for other reasons, held void in England.²

And in a stronger case, where, according to the Common Law of England, the marriage would have been valid, the parties having been married in the presence of two witnesses, at a hotel in Versailles, by a clergyman of the Church of England, using the rites and ceremonies of the Church of England; but the marriage was invalid and void by the Code Napoleon, it was held invalid in England.³ And even in a still stronger case, where the marriage was solemnised in the English church at Antwerp, in the presence of the consul, by a minister of the Church of England, but the marriage was not validated by 4 Geo. IV, c. 91; it was held invalid in England, as not conforming to the *lex loci*.⁴

But marriages in barbarous, uncivilised, and pagan countries, according to the local rites, will not be valid in England. For a union between a man and a woman in

¹ For instances of the Doctrine of Extra-territoriality, or to marriages at Embassies, Consulates, Factories, etc., see *ante*, Chap. II, pp. 103-116; a marriage invalid by *lex loci* may be valid by English statutes or the Doctrine of Extra-territoriality; *Lloyd v. Petitjean* (1839), 2 Curt., 251.

² *Scrimshire v. S.* (1752), 2 Hag. Con., 395; followed *Middleton v. Janverin* (1802), 2 Hag. Con., 437; also a case of clandestine marriage invalid by the *lex loci*.

³ *Lacon v. Higgins* (1822), 3 Stark, N. P., 178; 2 D. & R., App., 38.

⁴ *Kent v. Burgess* (1840), 11 Sim, 362; and see *Lacy v. Dickinson* (1769), 2 Hag. Con., 386, n.; and see *ante*, Chap. II, pp. 112, 113.

a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England, unless it be formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union for life of one man to one woman, to the exclusion of all others. In this case, where Commander Bethell, being in South Africa, married Teepoo, a Baralong girl, according to the customs of the Baralongs, a tribe having no religion, and allowing polygamy, and he refused to marry her in church, the union was considered not to amount to marriage, and the issue of Teepoo to be illegitimate.¹ Also, where two English people became Mormons, a sect acknowledging polygamy, and, as such, intermarried at Utah, in the United States of America, before Brigham Young, such marriage, although both of the parties were then unmarried, and although it was valid in the United States, was considered void in England.²

Japan is considered a civilised country, and accordingly, in a case where Francis Brinkley had married Yasu Tanaka according to the forms required by the law of Japan, and it was proved in evidence that the marriage was valid according to the law of Japan, and that by such a marriage the petitioner was precluded from marrying any other woman during the marriage, it was held, on a petition under the Legitimacy Declaration Act, 1858, that the marriage was valid in England.³

As to marriages abroad in Embassies and Consulates, see Chap. II, pp. 106–113.

¹ *In re Bethell* (1888), 38 Ch. D., 220 ; and see *Armitage v. A.* (1866), L. R., 3 Eq., 343 ; and Hubback on Succession, p. 332 ; and see *re Ullee* (1885), 1 Times Reports, 667 ; 54 L. T., 586, C. A.

² *Hyde v. H.* (1866), L. R., 1 P. & M., 130.

³ *Brinkley v. A.-G.* (1890), 15 P. D., 76.

(b) *Capacity of the Parties*

Although questions of marriage are *prima facie* to be judged of by the law of the country where they are solemnised, yet the capability of the parties to contract must be ascertained. If one or both parties, being domiciled British subjects, were by the law of England prohibited by a personal incapacity from entering into such a contract, the law of England must be applied, and the marriage will be void.¹

And, therefore, if either of the parties are by the law of England already married, and not divorced *a vinculo*, any second marriage abroad by one of them, although valid as to form by the *lex loci*, will be invalid.²

Also, the marriages of members of the British Royal Family contracted abroad contrary to and invalid by the Royal Marriage Acts, will, although valid by the *lex loci*, be invalid in England.² For the Royal Marriage Act extends to prohibit the contracting of marriages, or to annul any already contracted, wherever the same may be contracted or solemnised, either within the realm of England or without. Such marriages are not merely invalid as regards succession to the Crown, but altogether null and void, and issue illegitimate.³

As to marriages abroad within the prohibited degrees, their validity depends on the domicile of the parties. If persons domiciled in England contract a marriage abroad

¹ *Conway v. Beazley* (1831), 3 Hag. Ec., 639, p. 652.

² *Conway v. Beazley*, *ubi sup.*; *re Dixon* (1855), 2 Spinks, Ecc. & Ad., 205; *Dolphin v. Robins* (1859), 7 H. L. C., 390; *Shaw v. Gould* (1868), L. R., 3 H. L., 55; *Shaw v. The Attorney-General* (1870), L. R., 2 P. & M., 156; *Briggs v. B.* (1880), 5 P. D., 163; *Bonaparte v. B.* (1892), Times, Aug. 1, p. 9, Aug. 2, p. 10; and see *post* as to validity of foreign divorces, p. 525.

³ *Heseltine v. Lady Augusta Murray* (1794), 2 Ad., 400, n.; *Sussex Peerage case* (1844), 11 Cl. & F., 85; and see *ante*, Chap. II, pp. 117-121.

which is forbidden by the law of England, the House of Lords have laid down that it will be invalid in England although it might be valid by the law of the country where it was solemnised. So where a domiciled Englishman married in Holstein, where such a marriage was valid, his deceased wife's sister, also a domiciled Englishwoman, the marriage was held invalid and void in England.¹ The same rule applies even though one only of the parties is English. For where a person who was a native of Hesse Cassel, but who had become a domiciled naturalised Englishman, married at Frankfort his deceased wife's half-sister, the marriage was declared invalid in England notwithstanding that the woman was domiciled at Frankfort, and that by the law of Frankfort and of Hesse Cassel such a marriage was valid. The Court said that if the man was incapacitated by the law of his domicile from entering into the marriage, the fact that the woman was domiciled at Frankfort had no effect. There could be no valid contract unless each was competent to contract with the other.²

It, however, appears that the prohibitions of consanguinity and affinity do not apply to marriages in a colony where a different law exists, if both parties to the marriage are domiciled in that colony.³

However, as yet no case has been decided upholding the validity of a marriage, and the legitimacy of the issue of such marriage, if the marriage is forbidden as incestu-

¹ *Brook v. B.* (1861), 9 H. L. C., 193; as to what are the prohibited degrees, see Chap. II, pp. 30-32.

² *Mittle v. M.* (1859), 1 Sw. & Tr., 416; the principle of the decision in this case is inconsistent with *Sottomayer v. De Barros* (1879), 5 P. D., 94, where the fact that one only of the parties was domiciled in a country—Portugal—whose law forbade the marriage, was held insufficient to make a marriage in England null; see *post*, pp. 523, 524.

³ *Brook v. B.* (1861), 9 H. L. C., 193.

ous by the law of England. But, on the contrary, the House of Lords, on a Scotch appeal, decided in 1859 that the issue of a marriage in England between a man and his deceased wife's sister, previous to Lord Lyndhurst's Act, and not annulled by a decree of the English Ecclesiastical Court, could not be considered as legitimate so as to inherit land in Scotland, although such issue were legitimate in England, the reason of the decision being that such a marriage was considered criminal, and forbidden by the law of Scotland, and could not be recognised.¹

SEC. 3.—VALIDITY IN ENGLAND OF MARRIAGES OF FOREIGNERS IN ENGLAND

Generally, as to marriages of foreigners in England, a marriage between a foreigner and an English subject, or between two foreigners, is considered valid in England if in conformity with the English Law. So where two domiciled French subjects eloped to England for the purpose of evading the law of France, and contracted a marriage in England, which for want of the consent of parents, required by the law of France, was invalid in France, and was declared null and void by a French Court, still the English Court considering that the parental consent was part of the ceremony of the marriage, and not a matter affecting the personal capacity of the parties to contract marriage, declared such marriage valid.²

If, however, the parties are by the law of their domicile under a personal incapacity, their marriage being by the law of their domicile void and incestuous, their marriage contracted in England will be considered by the English Courts invalid. In one case, two domiciled Portuguese

¹ *Fenton v. Livingstone* (1859), 3 Macq. H. L., 497.

² *Simonin v. Mallac* (1860), 2 Sw. & Tr., 67; and see *post*, p. 529.

who were second cousins, and therefore by the law of Portugal prohibited to marry except after a papal dispensation, intermarried in England, their marriage was declared void. But this decision only applies when both the contracting parties are at the time of the marriage domiciled in a country whose municipal law prohibits such marriage.¹ And in this very case, where it subsequently was proved that the husband was domiciled in England, the marriage was upheld; so the former decision cannot be relied as an authority for setting aside a marriage in England between a foreigner and an English subject on the ground of any incapacity not recognised by the law of England.²

Also where two Irish persons married in England were validly divorced in Cape Colony, where they were domiciled, the effect of the divorce being to annul the existing marriage and restore the parties to the position of unmarried persons, the remarriage of the guilty respondent and correspondent in England was held valid, notwithstanding that the law of the colony prohibited the marriage of the guilty party so long as the innocent party remained unmarried. The reason of the decision was that the Court deemed this prohibition was a personal disability not applying after the respondent left the jurisdiction of the colony and settled in England.³

As to marriages of foreigners in England at Embassies and Consulates not conforming to the English Law,

¹ *Sottomayer v. De Barros* (1877), 3 P. D., 1, C. A.; the converse case is *Brook v. B.* (1861), 9 H. L. C., 193, where the marriage in Denmark of a domiciled Englishman with his deceased wife's sister, a domiciled Englishwoman, was declared void; see *ante*, p. 522.

² *Sottomayer v. De Barros* (1879), 5 P. D., 94; the reason of this decision is inconsistent with *Mette v. M.* (1859), 1 Sw. & Tr., 416; see *ante*, p. 522.

³ *Scott v. A.-G.* (1886), 11 P. D., 128, explained *Warter v. W.* (1890), 15 P. D., 152.

foreign nations usually authorise their diplomatic agents to celebrate marriages ;¹ but it seems doubtful how far the law of England will recognise a marriage at a foreign Embassy or Consulate in England, if one or, still more, both of the parties to a marriage is not a subject of the country in whose Embassy or Consulate the marriage is celebrated.²

SEC. 4.—VALIDITY IN ENGLAND OF A FOREIGN DIVORCE OR NULLITY, ETC.

In a recent case, the House of Lords laid down that

“The English Courts will recognise as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an Englishwoman, when the decree of divorce is not impeached by any species of collusion or fraud. And this though the marriage may have been solemnised in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.”³

In this case the husband was always, both at the time of marriage and divorce, a domiciled foreigner, and therefore the wife by marriage took his domicile.³

If, however, the husband is not domiciled in the country whose tribunal grants the divorce, more especially if he went there for the purpose of obtaining a divorce, the divorce will be invalid.⁴

¹ Calvo, *Le Droit International*, vol. ii., sec. 798.

² *Pertreis v. Tondear* (1790), 1 Hag. Con., 136 ; and see *ante*, pp. 63, 106, and *post*, p. 529.

³ *Harvey v. Farnie* (1882), 8 App. Ca., 43 ; *Turner v. Thompson* (1888), 13 P. D., 37, overruling *M'Carthy v. Decaix* (1831), 2 Russ. & My., 614. See also *Ryan v. R.* (1816), 2 Phillim., 332, where a Danish divorce was held good ; *Warrender v. W.* (1835), 2 Cl. & F., 488 ; and *Heath v. Lewis* (1864), 4 Giff., 665 ; and *Argent v. A.* (1865), 4 Sw. & Tr., 52 ; *Scott v. A.-G.* (1886), 11 P. D., 128, in which last three cases a colonial divorce was held good.

⁴ *Dolphin v. Robins* (1859), 7 H. L. C., 390 ; *Pitt v. P.* (1864), 4

In any case, the foreign tribunal must expressly purport to dissolve by its divorce the British marriage.¹ The French Courts usually decline divorce jurisdiction over foreigners.²

As to the validity in England of a sentence of nullity pronounced by a foreign Court on the marriage in England of foreigners domiciled abroad, there are conflicting decisions. In an earlier case, where two domiciled French subjects had come over to England to contract marriage and immediately after returned to France, and the French Court pronounced their marriage in England invalid, because contracted by minors without consent, the English Court declined to follow the French Court's decree of nullity, and declared the marriage valid.³ In another case, a domiciled Englishwoman had married at Southsea an American citizen. They cohabited in America till a Colombian Court declared the marriage void on account of the husband's impotence. Hannen, Pres., held the American decree of nullity was good and valid.⁴

A Pope's decree of separation between married persons wishing to enter religion, would, it would seem, have no effect unless the parties were domiciled at Rome at the time of the separation ; or such decree was valid by the law

Macq., 627 ; *Shaw v. Gould* (1868), L. R., 3 H. L., 55 ; *Shaw v. A.-G.* (1870), L. R., 2 P. & M., 156 ; *Briggs v. B.* (1880), 5 P. D., 163 ; and see the earlier cases of *R. v. Lolley* (1812), Russ. & R., 237 ; *Conway v. Beasley* (1831), 3 Hag. Ec., 639 ; *Sinclair v. S.* (1798), 1 Hag. Con., 294 ; and see *Colliss v. Hector* (1875), L. R., 19 Eq., 334 ; *Bonaparte v. B.* (1892), the Times, Aug. 1, p. 9 ; Aug. 2, p. 10.

¹ *Birt v. Boutinez* (1868), L. R., 1 P. & M., 487.

² *Gould v. G.* (1892), P., 240.

³ *Simonin v. Mallac* (1860), 2 Sw. & Tr., 67 ; if the marriage had been solemnised in France, even between English subjects, and declared void by a French Court, the English Court would have accepted and followed the French Court's sentence ; see *ante*, p. 519.

⁴ *Turner v. Thompson* (1888), 13 P. D., 37.

of their domicil.¹ If, however, such decree was pronounced following and in accordance with the previous voluntary consent of both parties to separate and enter religion, it would be supported as a separation agreement, and so be a good defence to a suit for restitution.²

SEC. 5.—LEGITIMACY IN ENGLAND

The general rule is, the law of the domicil of a deceased person governs the succession to personal property;³ but if the "successor" is by the law of his own domicil legitimate, he will be entitled to share in the distribution of personalty here, although by the English law illegitimate.⁴ The usual instance of children, illegitimate by the law of England, succeeding, is where such child has, by the law of its domicil, been legitimated by the subsequent marriage of its parents. As to this the Lord Chancellor in the House of Lords laid down—

"The *status* of the child—with respect to its capacity to be legitimated by the subsequent marriage of its parents—depends wholly on the *status* of the putative father, not on that of the mother. . . If his domicil be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father is capable of legitimating the child. The foreign law, though deeming the child to be *filius nullius* at birth, yet recognises the father as such at the moment of his acknowledging the child, either by marriage and formal recognition, as in France, or by marriage only, as in Scotland.⁵

Legitimatio per subsequens matrimonium is the law of Scotland (see *post*, Chap. XVIII, pp. 550, 551); it is also

¹ *Connelly v. C.* (1851), 7 Moore P. C., 438.

² See Chap. X, p. 376.

³ *Dogliani v. Crispin* (1886), L. R., 1 H. L., 301.

⁴ *Goodman's Trusts* (1881), 17 Ch. D., 266, C. A.; *in re Grove* (1888), 40 Ch. D., 216, C. A.; *Skottowe v. Young* (1871), L. R., 11 Eq., 474.

⁵ *Udny v. U.* (1869), L. R., 1 Sc. & D., 441, p. 447; and see Fraser on Parent and Child, 2nd ed., pp. 45-64; and see an article in the Law Times, Nov. 16, 1889, vol. lxxxviii., p. 42.

the law of France, and in several cases a French child so legitimated has been admitted to take personalty in England ;¹ and so also according to the law of Holland,² or Switzerland.³

It is immaterial where the child is born, even if it is born in England or any other country where legitimation by subsequent marriage is not the law ; still, if its father was domiciled in a country whose law permitted legitimation, the child may be legitimated though born a bastard.⁴ But it appears to be the more correct opinion that the father must be domiciled in a country permitting legitimation at the date both of the birth of the child and of the subsequent marriage. For in a case where the father, and therefore the child, was domiciled in England at the date of the child's birth, Lord Chancellor Hatherley said—

“ I have myself held, and so have other judges in the English Courts, that according to the law of England a bastard child whose putative father was English at its birth, could not be legitimated by the father afterwards acquiring a foreign domicile and marrying the mother in a country by the law of which a subsequent marriage would have legitimated the child. . . . I do not think that the English Law can recognise a capacity in any Englishman, by a change of domicile, to cause his paternity and consequent power of legitimation to be recognised.”⁵

This rule of succession as to personalty does not apply to succession as heir to land. For a person born out of wedlock, although legitimated by subsequent marriage, according to the law of his domicile, cannot succeed to land

¹ *Skottowe v. Young* (1871), L. R., 11 Eq., 474 ; but see *Boyes v. Bedale* (1863), 1 H. & M., 798 ; *Wright's Trusts* (1856), 2 K. & J., 595.

² *Goodman's Trusts* (1881), 17 Ch. D., 266, C. A.

³ *In re Grove* (1888), 40 Ch. D., 216, C. A.

⁴ *In re Grove* (1888), 40 Ch. D., 216, C. A., where the child was born in England.

⁵ *Udny v. U.* (1869), L. R., 1 Sc. & D., 441, p. 447 ; and see *Wright's Trusts* (1856), 2 K. & J., 595 ; *in re Grove* (1888), 40 Ch. D., 216, C. A.

in England.¹ And *è converso*, a domiciled Scotsman father, a bastard son, legitimated by subsequent marriage, according to the law of Scotland, cannot succeed as heir to his son's English land if such son die intestate.²

SEC. 6.—FOREIGN VIEWS OF MARRIAGES AND DIVORCES
IN ENGLAND AND MARRIAGES AT ENGLISH EMBASSIES
AND CONSULATES.³

It sometimes happened that when a foreigner had contracted a marriage in England with a British subject, that the Foreign Courts subsequently declared such marriage void because not contracted with the consent of the parents.⁴ In 1889 a convention was come to with the French Republic whereby a French Consul could give a certificate that the legal notices required by the French law had been given, and a marriage following thereon would be valid.⁵

As to Belgium, a similar convention was in 1882 arrived at.⁶ As to marriages celebrated at a British Embassy or Consulate where one or both of the parties is not a British subject, the French Courts usually consider such marriages null and void.⁷

¹ *Birtwhistle v. Vardill* (1840), 7 Cl. & F., 895.

² *Don's Estate* (1857), 4 Drew, 194.

³ As to International Law, see Calvo, *Le Droit International*, 4th ed., vol. ii., secs. 749-817; Clunet's *Journal du Droit International Privé*, tit. Mariage and Divorce; Westlake's *Private International Law*, 3rd ed., chap. iv.; Wharton's *Conflict of Laws*, 2nd ed., chap. iv., sects. 126-239*a*.

⁴ For France, see Code Civil, Articles 170, 171.

⁵ See *Herstlet's Treaties*, vol. xvii., pp. 414-417; *London Gazette*, 1886, April 23, pp. 1962, 1963.

⁶ See *Herstlet's Treaties*, vol. xvii., pp. 256, 267; and see *London Gazette*, 1889, Feb. 5, vol. i., pp. 665-667.

⁷ Calvo, *Le Droit International*, vol. ii., secs. 798-803; *Este v. Smyth* (1854), 18 Beav., 112; and see the Marriage Laws Commission, 1867

As to divorce, the French Courts recognise the validity of a divorce of a marriage celebrated in France, if regularly obtained in the country where the parties are domiciled,¹ and they usually decline to exercise divorce jurisdiction over foreigners.²

[4059], pp. 189 and seq., the evidence of the Right Hon. Edmund Hammond, Under Secretary of State for Foreign Affairs; and for the converse case, see *Pertreis v. Tondear* (1790), 1 Hag. Con., 136. By the Foreign Marriage Act, 1892, 55 & 56 Vict., c. 23, s. 19, power is given to a marriage officer to refuse to solemnise a marriage inconsistent with International Law. By the Order in Council under the Foreign Marriage Act, 1892, restrictions are placed on the solemnisation of Consular marriages between British subjects and aliens; see *ante*, pp. 63, 106, 108, 524, 525.

¹ Calvo, *Le Droit International*, vol. ii., secs. 806-817; and see Appendix to *Pitt v. P.* (1864), 4 Macq., 627, pp. 649-677; and *De Ricci v. De R.* (1891), P., 378.

² *Goulden v. G.* (1892), P., 240.

CHAPTER XVIII

SCOTLAND ¹

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SEC. 1.—REGULAR MARRIAGES

(a) *Ministers qualified to solemnise*

Established Church.—Ministers of the Established

¹ Fraser on Husband and Wife, 2nd ed., 1878; Fraser on Parent and Child, 2nd ed., 1866; Report of the Royal Commission on Marriage, Parl. Paper, 1867, 68 [4059]; and see Report of a Select Committee on Marriage, Scotland, Parl. Paper, 1849, R., 310: Bell's Principles of the Law of Scotland, 9th ed., 1889.

Church of Scotland, it being the National Church, have the right to marry validly persons of any religion. Such regular marriage *in facie ecclesiæ* must be preceded by banns; the proclamation thereof being *inter sacra*, and forming part of the Church discipline, the civil power supporting the ecclesiastical authority.¹ Or, by the Marriage Notice (Scotland) Act, 1878, a regular marriage by a minister may be celebrated on a registrar's certificate, which is of equal authority to certificate of proclamation of banns.²

Before 1712 the solemnisation of marriage by any other person than a minister of the Established Church was prohibited under severe penalties, and deemed clandestine and irregular.

Episcopalians.—Clergymen of the Episcopal Church were then first allowed to solemnise marriages³ only after the "banns have been duly published three several Lord's days in the Episcopal congregations which the two parties frequent, and in the churches to which they belong as parishioners by virtue of their residence,"³ or the marriage may take place after the registrar's certificate.⁴

Other Priests and Ministers are also empowered to celebrate marriages after proclamation of banns⁵ or a registrar's certificate.⁶

Quakers and Jews can also intermarry on a registrar's certificate.⁷

(b) *Form of Marriage*

"It is not necessary that regular marriages in Scotland

¹ *Hutton v. Harper* (1876), 1 App. Ca., 464.

² 41 & 42 Vict., c. 43.

⁴ 41 & 42 Vict., c. 43.

⁶ 41 & 42 Vict., c. 43.

³ 10 Anne, c. 10.

⁵ 4 & 5 Will. IV, c. 28.

⁷ *Ib.*, s. 5.

should be solemnised in any particular form, or at any particular place or time. The presence of any minister of religion at the time of solemnisation, wherever it takes place (or in the case of Quakers and Jews, of their proper officers), entitles them to the character of marriage *in facie ecclesiæ*, and (except in the cases of Roman Catholics and Protestant Episcopalians, whose general practice is to marry in their churches or chapels) they are, in fact, usually solemnised in private houses, and indiscriminately at all hours of the day.”¹

These provisions, however, are merely directory, the only nullifying statute being Lord Brougham’s Act (see *post*, p. 535). So non-compliance with the legal conditions of regular marriages as to banns or otherwise, may subject the parties to statutory penalties (a minister, clergyman, or priest celebrating a marriage without proclamation of banns or registrar’s certificate is liable to a penalty of £50²), but “cannot effect the validity of the interchange of consent as constituting marriage; the utmost effect of such non-compliance being to make the marriage irregular.”¹

Even a marriage *in facie ecclesiæ* may be set aside as a nullity if the Court is satisfied that the parties had no real matrimonial intention, and never regarded the ceremony as binding.³

¹ Royal Commission on Marriage, 1868, Report, pp. xvii, xviii.

² 41 & 42 Vict., c. 43, s. 12.

³ *Jolly or Macneill v. M’Gregor* (1828), 3 Wils. & Sh., 85, 2 Bli., N. S., 393, cited in *Steuart v. Robinson* (1875), L. R., 2 Sc. & D., 494, p. 534; and see *post*, pp. 537 and seq.

SEC. 2.—IRREGULAR AND CLANDESTINE MARRIAGES

(a) General

By the ancient law of Scotland adopting the Ante-Tridentine Canon Law, irregular or clandestine marriages contracted by the parties openly or secretly, without the intervention of any minister of religion or religious ceremony, are undoubtedly valid,¹ although by certain old statutes, persons contracting irregular or clandestine marriages were liable to penalties.²

What facts are sufficient to evidence or constitute such irregular marriage have been so frequently discussed in the last twenty-five years on appeals to House of Lords, that little uncertainty remains as to the law. The general effect of these decisions is that the facts to constitute a marriage must be strong and conclusive, and that a person cannot be married by accident or against his or her will.

The expediency of this law and its effect on morality have been gravely doubted, and the Royal Commission on Marriage of 1868 reported adversely to it.³

Residence.—The following statutory restriction, passed in 1856, has been placed on these irregular marriages, requiring on pain of nullity as follows,—twenty-one days residence. “Before this statute, it was very common for English persons to contract clandestine marriages in Scotland, at Gretna Green and other places, immediately after crossing the border, a practice which this Act has effectually suppressed.”⁴

¹ Report of Royal Commission on Marriage, 1868, pp. 16 and 17.

² Act of 1698, c. 6; and see Fraser on Husband and Wife, 2nd ed., vol. i., p. 255; as to registration of a conviction thereunder, see *post*, p. 548.

³ Parl. Paper, 1867–68 [4059], pp. 27–34.

⁴ Report of Royal Commission on Marriage, 1868, p. 16; and see the

The Marriage (Scotland) Act, 1856, commonly called Lord Brougham's Act, provides—

“After December 31, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony shall be valid unless *one* of the parties had, at the date thereof, his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage, any law, custom, or usage to the contrary notwithstanding.”¹

The twenty-one days' residence required by this Act means twenty-one full days completed, the day running from midnight to midnight, as was decided in the following case. Miss Lawford and Mr. Davies, intending to contract a clandestine marriage, left London for Scotland by the train which was timed to pass Berwick-upon-Tweed at 4 A.M. on the 1st of July 1870, and they arrived at Edinburgh about 6 A.M. of that day. After remaining in Scotland until the 21st of July following, they, between 11 and 12 A.M. of that day, contracted a marriage by declaration before the registrar at Edinburgh. It was held by Sir James Hannen, after hearing evidence of Scotch Law, that the parties had not lived in Scotland for twenty-one days next preceding the marriage, and that, therefore, it was invalid.²

(b) *Per verba de præsenti*

“Nothing more is necessary to constitute actual marriage by the law of Scotland than a present interchange of consent, in whatever manner given, to become husband and wife. If this be done without due publication of banns or without the intervention of a minister of religion, it is irregular; and it falls equally within this category, whether the consent is declared in the most open and

speeches of Lord Brougham and debates in the Commons, Hansard, 3rd series, vol. cxli., p. 1587; vol. cxlii., pp. 205, 322, 2159; vol. cxliii., p. 997.

¹ 19 & 20 Vict., c. 96.

² *Lawford v. Davies* (1878), 4 P. D., 61.

authentic manner before a Justice of the Peace, or before a civil registrar, or before any unauthorised person taking upon himself to celebrate marriages (as used to be the practice at Gretna Green), or in the most secret and private manner between the parties themselves, with or without witnesses, and with or without any subsequent open acknowledgment or matrimonial consent.”¹

The constitution of a marriage *per verba de præsenti* was the subject of a most learned and elaborate dissertation by Lord Stowell in 1811 in the celebrated *Dalrymple* case,² and in 1813 in the House of Lords on a Scotch appeal by Lord Eldon, L. C., presiding on the woolsack.³ In these cases it is laid down after distinguishing *verba de præsenti* and *de futuro* (as to which latter, see *post*, p. 546) that a contract *per verba de præsenti* constituted *ipsum matrimonium*; that it was not necessary that it should be consummated *consensus non concubitus facit matrimonium*, and that such consent and contract need not be in writing, but may be proved by parol evidence. In the case before the House of Lords marriage was constituted so as to give right of widowhood to the woman, and legitimacy to children then born by these words of present consent exchanged between a man and his then mistress; the man contemplating suicide at the time, and committing it immediately after the words were spoken.³

A written declaration of marriage *de præsenti* signed by both parties, and delivered by the man to the woman, conclusively establishes the contract. In this case a youth of twenty married his mother's housemaid, three years older than himself; the courtship having been

¹ Report of the Royal Commission on the Laws of Marriage, 1868, p. xviii.

² *Dalrymple v. D.* (1811), 2 Hag. Con., 54.

³ *M'Adam v. Walker* (1813), 1 Dow, 148.

carried on in the kitchen, and the connubial relation only known to the coachman and other servants of the family. The husband, when awoke to his error, treated and represented the whole affair as a jest. The woman produced the following declaration written by the man on the fly-leaf of his Bible, which he delivered to her :—

“I James Ogilvie Tod Forster, take thee, Jessie Grigor, to be my wedded wife from this day henceforth until death us do part ; and thus do I plight thee my troth.

“I, Jessie Grigor, take thee, James Ogilvie Tod Forster, to be my wedded husband from this day henceforth until death us do part ; and thus do I plight thee my troth.

“JAMES OGILVIE TOD FORSTER.

JESSIE GRIGOR.

“September 2, 1865.”

Intercourse followed between the parties. The House of Lords held that the marriage was proved.¹

The consent must be *real*, mutual, and with the intention on both sides of constituting a marriage. A consent given in form but not in fact as to a sham marriage imports no validity.

“The most express declarations, oral or in writing, by both parties that they are husband and wife, will not make them so unless the judge is satisfied that the inward intention of their minds was in accordance with these outward words or acts. This has been held, not only as to declarations in the past, but even as to *verba de presenti*, which, if sincerely spoken, would have themselves constituted a marriage.”²

This principle was applied and illustrated by a decision in 1875 of the House of Lords on a Scotch appeal of which the facts were as follows :—Major William George

¹ *Forster v. F.* (1872), L. R., 2 Sc. & D., 244 ; and see *Hamilton v. H.* (1842), 9 Cl. & F., 327, although it was therein stipulated that the marriage was to be temporarily kept secret.

² The Royal Commission on the Laws of Marriage, 1868, p. xx ; and see *Imrie v. I.* (Nov. 26, 1891), 19 R., 185.

Drummond Steuart was the heir of a baronetcy and of a large estate in Scotland. He had served as an officer in the 93rd Highlanders throughout the Crimea and the Indian Mutiny, and was a V.C. On his return to Scotland he fell into drunken and dissolute habits. He had cohabited with two women, by each of whom he had had an illegitimate child. He was rarely sober, and was continually drunk in low company, and in that state attracted attention and violated decency in public places. In 1865, when nearly forty, he made the acquaintance of and became familiar with Margaret Wilson, then sixteen, the daughter of a fishing-tackle maker in Edinburgh, in whose house a supper was given, Feb. 13, 1866; the party consisting of the Major, the father and mother of Margaret Wilson, her elder brother, and her friend a Mrs. Kellet. After supper the father said to the Major, "I am getting a bad name with your staying so long in my house among my three daughters." The Major answered, "I will show you what I can do to shut up people's mouths. I am poor now, and cannot marry; but I will marry her in Scotch fashion." Whereupon the Major went down on one knee, took a wedding-ring from his pocket, put it on Margaret's finger, and said, "Maggie, you are my wife before heaven; so help me, O God!" They then kissed each other; and Margaret said "O Major!" The health of the couple was drunk, and the entertainment was closed by the Major and Margaret being "bedded" according to an obsolete Scotch fashion. The Major and Margaret Wilson lived together for some weeks after the supper festivity, and at several periods subsequently; but there was no continuous matrimonial cohabitation; nor did they represent each other to third parties as husband and wife—the Major invariably repudiating the marriage till on his deathbed he appeared,

but somewhat doubtfully, to admit it, being then in a fit of *delirium tremens*. A son was born in 1867 which the mother registered as illegitimate. The Major died in 1868, whereupon she claimed alimony for the boy as a bastard ; and she signed receipts for the allowance, not as a widow, but as a spinster. In 1871 she married Lieutenant Robertson, and in 1872 her child died. She sued for declarator of marriage.

The House of Lords, reversing the decision of the Court of Session, held that no marriage was contracted ; it appearing clearly that no real marriage was then intended by either of the parties, although the ultimate maturing of matrimony and legitimation under Scotch Law of any issue that might be procreated in the interval was hoped for and confidently anticipated by "Maggie" and her friends.¹

The establishment of a marriage *per verba de præsenti* privately interchanged requires a considerable body of conclusive evidence.² And the fact that the parties previous to the alleged consent had cohabited in concubinage, and that subsequent thereto one of the parties had publicly married and the other had intended or been willing to marry, will make the establishment of private clandestine marriage still more difficult.²

Acknowledgment also has considerable evidence of consent *per verba de præsenti*, as also of a marriage by habit and repute ; as to which, see *post*, pp. 541-546.

The baptism and registration of a child of the alleged marriage as legitimate is evidence in favour of its validity.³

¹ *Stewart v. Robertson* (1875), L. R., 2 Sc. & D., 494 ; and see *Robertson v. Crawford* (1840), 3 Beav., 102.

² *Dysart Peerage* case (1881), 6 App. Ca., 489.

³ See *ante*, Chap. III, pp. 140-142, but it is not conclusive ; see *Dysart Peerage* case, *ubi sup.*, p. 533.

A second marriage unexplained between the same parties throws doubt on the existence of the first.¹

Mental Reservation by one Party.—

“Although where *both parties* agree that the apparent contracts shall be nothing more than a farce, or as a mere cover and blind for another purpose than marriage, the Court will not hold the transaction to be marriage, yet if only one of them have this intention, and the other truly mean to contract marriage, no mental or different intention on the part of the first not stated to the other will have the effect of invalidating the contract.”² For, said Lord Stowell, it cannot be the law “that in such a transaction a man shall use serious words, expressive of serious intention, and shall yet afterwards be at liberty to aver a private intention, reserved in his own breast to avoid a contract which was differently understood by the party with whom he contracted.”³

Consent obtained by Fraud.—This will rarely avail to annul a marriage unless there is force or duress, or it is exercised on a person weak in mind or young in years (see *ante*, Chap. II, pp. 23-28). But in one instance the law of Scotland recognised the fraud may be practised on a person of mature years, the law being that a promise given *in æstu amoris* did not constitute marriage; and this proved, may suffice to annul the marriage. “For example, a woman gets a man into some retired place for the purpose of carnal connection, and there, before this is allowed to proceed, she obtains from him a promise of marriage, and *copula* immediately follows. She has, at the same time, two or three witnesses stationed so as to hear the promise, but concealed from the man. The consent here has been obtained *in æstu amoris*, without any intention on his part, she well knowing it, of entering into marriage, and where, if he had known—that

¹ *Shedden v. Patrick* (1869), L. R., 1 Sc. & D., 470, pp. 512, 513.

² *Fraser on Husband and Wife*, 2nd ed., p. 436.

³ *Dalrymple v. D.* (1811), 2 Hag. Con., 54, p. 107, and cited with approval in the House of Lords, *Dysart Peerage* case (1881), 6 App. Ca., 489, p. 493.

there were witnesses to the transaction, he would not have made the promise. The marriage, therefore, being brought about by the fraudulent contrivance of the woman, the Court has refused in such cases to sustain it.”¹

(c) *By Habit and Repute*

“‘Habit and repute,’ or the reputation of being married persons, acquired among relatives, friends, and acquaintances by persons living together as husband and wife, is often spoken of as if it were another distinct mode of contracting marriage in Scotland. This, however, is not a correct view of the law ; such reputation does not constitute, but is merely evidence of marriage.”²

The presumption of marriage from habit and repute is laid down in the text writers to have arisen from the statute of 1503, enacting that a widow who was, during her husband’s life, held and reputed his wife, shall enjoy her terce till it is proved by the opposer that she was not a lawful wife.³

Cohabitation with the required repute as husband and wife is proof that the parties between themselves have mutually contracted the matrimonial relation. It demonstrates that exchange of consent which alone constitutes marriage in Scotland. The law of habit and repute, however, is not peculiar to Scotland, although in countries where the facilities of marriage are less than in Scotland the evidence to establish the marriage must be stronger.⁴

Repute alone will not suffice, there must be cohabita-

¹ Fraser on Husband and Wife, 2nd ed., p. 460, citing *Harvie v. Inglis*, 19th Feb. 1839, 15 S., 964 ; 1 D., 536.

² The Report of the Royal Commission on Marriage, 1868, p. xx ; and see *De Thoren v. The Attorney-General* (1876), 1 App. Ca., 686.

³ Thompson’s Statutes, vol. ii., p. 243, 1503, c. 77 ; Fraser on Husband and Wife, 2nd ed., vol. i., p. 393.

⁴ The *Breadalbane* case, *Campbell v. C.* (1867), L. R., 1 Sc. & D., 182 ; approved in the *Dysart Peerage* case (1881), 6 App. Ca., 489, p. 549 ; and see *ante*, Chap. III, pp. 140–142.

tion with repute ; not mere intercourse by visiting, but a living together.¹

But although “the law of Scotland accepts the continuous cohabitation of man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry ; in order to sustain that inference their cohabitation must be within the realm of Scotland. Cohabitation furth of Scotland will not constitute marriage, although it may be competently founded on either as corroborative evidence of a ceremony in Scotland, or as evidence that a ceremony proved to have taken place in Scotland was truly intended by the parties as a present interchange of matrimonial consent.”²

The cohabitation also must have endured for some considerable time—several years ;³ and a cohabitation of only a month in Scotland will not suffice.²

“The cohabitation under the married character must be uniform and consistent, for a few instances in which a man behaves to a woman as his mistress will do away a thousand in which he addresses her as his wife. A man without the least thought of marriage may behave to his mistress as if she were his wife, may not choose to contradict her before strangers who call her such, nor to expose at all times the nature of the connection.”⁴

Describing a woman as a wife for the sake of decency does not evidence a marriage. Lord Watson said acknowledgments at a hotel or a shop are valueless as evidence, and, *per se*, not more conclusive of marriage than of concubinage.

“When a man takes his mistress with him to an hotel, or goes with her to a shop to buy baby linen, the probability is that he will prefer describing her as his wife to explaining her true position.”⁵

If a man elopes with a married woman and cohabits

¹ Fraser on Husband and Wife, 2nd ed., p. 401 ; and see the *Dysart Peerage* case, *ubi sup.*, p. 539 ; and see Chap. III, pp. 139-142.

² Lord Watson's judgment, *Dysart Peerage* case (1881), 6 App. Ca., 489, pp. 537, 538.

³ Fraser on Husband and Wife, 2nd ed., p. 400.

⁴ Royal Commission on Marriage, 1868, Report, p. xxi.

⁵ *Dysart Peerage* case (1881), 6 App. Ca., 489, p. 552 ; and see *ante*, Chap. III, pp. 139-142.

with her, this on the death of the husband may ripen into marriage. For the House of Lords has laid down that—

“A connection commencing in adultery may, on ceasing to be adulterous, become matrimonial by consent, and may be evidenced by habit and repute, the parties being at liberty to intermarry. The alteration in the character of the connection, from adultery to matrimony, need not be indicated by any public act, or by any observable change in the outward demonstration. Nor is it necessary to prove the specific period when the consent was interchanged.”¹

In this case, which decided the inheritance and title to the vast estates of the Marquis of Breadalbane, the facts were as follows:—In 1781, James Campbell of the Glenfalloch family, an ensign in the 40th foot, then stationed at Bristol, became acquainted with Eliza Maria Blanchard, the young wife of a middle-aged grocer named Ludlow. With James Campbell she eloped from her husband, who did not long survive her departure, for he died in 1784. The guilty parties, however, proved constant and true to each other. In 1782 they went to America with James Campbell's regiment, he representing her as his wife. In 1783 an elder brother of James Campbell, writing from Scotland to another brother in America, stated that “he had had a letter from James in America,” and that “he and Mrs. Campbell were both well,” the writer adding “that he had not seen her, but that she was exceeding well spoke of.” In February 1784 (a month after Ludlow's death), James Campbell and Eliza Marie Blanchard arrived in England with his regiment, which returned from Canada. It was then open to them to join hands, but they abstained from doing so. In 1788 they had a son, their eldest, named William

¹ The *Breadalbane* case, *Campbell v. C.* (1867), L. R., 1 Sc. & D., 182; followed *De Thoren v. The Attorney-General* (1876), 1 App. Ca., 686.

John Lambe Campbell, and the question was as to his legitimacy. After many wanderings in England they settled ultimately in Scotland, the country of James Campbell's domicil. Residing there constantly from 1793 till his death in 1806, they were universally reputed to stand towards each other in the sacred relation of husband and wife, although no regular marriage was ever shown to have taken place between them. Dreading, apparently, the effects of a public matrimonial celebration (which they knew was unnecessary in Scotland, and which might have roused suspicions, and instigated inquiry into the nature of their original connection), they seemed to have relied throughout on the familiar doctrine of habit and repute, and they did everything in their power to satisfy its requirements. They passed themselves off uniformly, unequivocally, and constantly as husband and wife; and they were received, and treated, and regarded as such by all their relations, associates, friends, and acquaintances; no one expressing or entertaining a doubt that the tie which bound them together was that of matrimony. The woman on James Campbell's death administered his estate, and claimed and received from the Horse Guards a pension as his widow till her death in 1823. Their eldest son, the said W. J. L. Campbell, and their younger children were deemed legitimate, and in 1812, W. J. L. Campbell, on the death of his uncle succeeded without opposition or question as heir of entail to Glenfalloch, which he enjoyed till his death, when it devolved on his eldest son, John A. G. Campbell, the respondent. In 1862, when the succession to the vast Breadalbane inheritance was in question, his cousin, Lieut. C. W. Campbell, the appellant, raised the question of W. J. L. Campbell's legitimacy, which he had not raised over the insignificant Glenfalloch

succession. If W. J. L. Campbell was legitimate, *i.e.*, if James Campbell and Eliza Maria were married, W. J. L. Campbell's son, the respondent, was admittedly the Breadalbane heir; but if not, the appellant was admittedly entitled. The House of Lords, affirming the decision of the Lord Ordinary and of the Court of Session, held that the marriage was proved; that, therefore, W. J. L. Campbell was legitimate; and the respondent, John A. G. Campbell, the Breadalbane heir.¹

This case was followed and applied shortly afterwards, and the principle laid down that—

“When a marriage ceremony has taken place in Scotland, the parties being ignorant of an impediment afterwards removed, and when believing themselves to be validly married, they lived together for years as husband and wife, and were regarded as such by all that knew them, the marriage was held to have been established by force of habit and repute, without any proof of mutual consent by verbal declaration.”²

In this case, W. E. W. Wall had obtained, July 1, 1862, a decree *nisi* for dissolution of marriage from the Divorce Court at Westminster, and July 16 following remarried at Glasgow. This marriage, having been solemnised before the decree absolute, and the expiration of the time for appealing, was invalid (see *ante*, Chap. VII, pp. 249, 288, and Chap. XIII, p. 423). Both honestly believed there was no impediment to their marriage, and they constantly cohabited as husband and wife, and were everywhere regarded and treated as such in Scotland, Ireland, and England till W. Wall's death in 1867. Of this marriage four children were born. On a petition under the Legitimacy Declaration Act, in England the opinion of the

¹ The *Breadalbane* case (1867), L. R., 1 Sc. & D., 182; the successful claimant's son, on his father's death in 1871, made out his right before the Committee of Privileges to be a Scotch peer; *Breadalbane Peerage Claim* (1872), L. R., 2 Sc. & D., 269.

² *De Thoren v. The Attorney-General* (1876), 1 App. Ca., 686.

Court of Session being taken, it was held as the habit and repute doctrine, that before the birth of the eldest son the parents had become married persons, and the validity of the marriage as established by habit and repute, without interchange of verbal matrimonial declaration, and the decision was affirmed by the House of Lords.¹

This principle of habit and repute would validate the marriage of a supposed widow or widower, taking place say in 1870, when the spouse supposed to be dead, as a matter of fact, survived till 1873, but the parties were ignorant of this, and cohabited till 1880.

A marriage by habit and repute which had been *prima facie* conclusively established, may be refuted by strong evidence, such as that of a subsequent marriage between the parties, which, if unexplained, wholly cuts away the ground for such prior marriage.²

(d) *Per verba de futuro* (*Promise of Marriage*)
subsequente copula

“Under this category of cases, the law of Scotland, as it is commonly understood, practically treats persons as married who have never interchanged any present contract to become thenceforth husband and wife. A mere *promise* of future marriage is, according to the present law of Scotland, of no greater force or effect than a similar promise in England or Ireland; and mere carnal intercourse, without more, is in Scotland, as in England or Ireland, concubinage and not marriage. Even to carnal intercourse, preceded by a promise of future marriage, no greater effect is ascribed, unless such promise is proved—(a) by writing under the hand of the party, or (b) by his or her confession upon oath. If it were given ever so publicly, in the presence of any number of credible witnesses, the testimony of such witnesses could not be received to prove it for the purpose of making the subsequent intercourse marriage. But to mere carnal intercourse, if preceded—(a) by a *written* promise of future marriage, or (b) by a promise *afterwards confessed upon oath*, the effect of marriage is practically given. In a proceeding taken to establish marriage upon this ground, the defender may be called upon

¹ *De Thoren v. The Attorney-General* (1876), 1 App. Ca., 686.

² *Shedden v. Patrick* (1869), L. R., 1 Sc. & D., 470, pp. 512, 513.

to confess or deny the promise on oath, if he has not in the meantime contracted marriage with any person other than the pursuer. But he cannot be put to his oath for such a purpose when the effect would be to invalidate another subsequent marriage. This protection is not given by the law to the innocent victim of the later marriage, if the other mode of proof, viz., writing, is resorted to. In that case, the promise *subsequente copula* will invalidate the later marriage, however solemnly it may have been contracted, and however secret the previous promise and the intercourse following upon it may have been kept."¹

But both the promise and the *copula* must take place in Scotland.²

"But it is still a doubtful and unsettled point in the law of Scotland whether the concurrence of these two facts (promise and *cum subsequente copula*) is sufficient without more to constitute marriage, or whether they merely constitute such a case of precontract as to be capable of being enforced on the principle of specific performance by a Court of justice, and to be a diriment impediment in the meantime to a marriage between either parties to such a precontract, and any other person not a party."

If this latter opinion is correct, the marriage cannot be established after the death of either party.³

SEC. 3.—REGISTRATION

There are no regular ecclesiastical marriage registers in Scotland, but a system of civil registration was established by 17 & 18 Vict., c. 80, and 23 & 24 Vict., c. 85.

As to *regular marriages*, the parties intending to contract must obtain from the district registrar a schedule containing the particulars. They must produce this,

¹ Report of Royal Commission of 1865 on Marriage, p. xix. ; and see *Honyman v. Campbell* (1831), 2 Dow & C., 265 ; *Forster v. F.* (1872), L. R., 2 Sc. & D., 244 ; and see two Scotch cases, *Surtees v. Wotherspoon* (Jan. 26, 1872), 10 M., 866 ; *Maloy v. M'Adam* (Jan. 9, 1885), 12 R., 431 ; the rule of law as to evidence is preserved by 37 & 38 Vict., c. 64, s. 3.

² *Yelverton v. Longworth* (1864), 4 Macq. H. L., 745.

³ Report of Royal Commission on Marriage, 1868, p. xix ; this doubt is expressly left open ; *Maloy v. M'Adam* (Jan. 9, 1885), 12 R., 431.

according to the Irish system (see Chap. XIX, pp. 564, 565), for the officiating minister, and at the ceremony it is to be signed by him, the parties, and two witnesses, and returned by the parties within three days to the district registrar. But the system does not work well, the poorer classes sometimes forgetting to return the certificate. The parties can, but rarely do, require the presence of the registrar at a regular marriage; if they do, he registers it at once.

As to *irregular marriages*, by 17 & 18 Vict., c. 80, ss. 48, 49, persons convicted (see *ante*, p. 534) of an irregular marriage are authorised and required to register the marriage in the parish where the conviction took place, and the magistrate is required to give notice of the conviction to the district registrar. Also after a decree of declarator by a competent Court, the irregular marriage may be registered. Also under Lord Brougham's Act, 19 & 20 Vict., c. 96, ss. 2, 3, parties who have contracted an irregular marriage may, within three months after such marriage (not later), jointly apply to the Sheriff or Sheriff-Substitute of the county where the marriage was contracted; and on being satisfied of the fact of the marriage, he may grant a warrant to the registrar to register the marriage.

Registers so kept are legal evidence.¹

SEC. 4.—PROHIBITED DEGREES

Previous to 1558 the prohibitions of consanguinity and affinity as obtaining in the Canon Law were the law of Scotland. At the Reformation two statutes were passed in 1567 as to prohibited degrees. The former (c. 15) punishing incest, which was defined as carnal inter-

¹ See Report of Royal Commission on Marriage, 1868, p. xxiii.

course with persons within the prohibited degrees, as contained in Lev. xviii., with death.¹ The second Act (c. 16), which was an enfranchising one, declared all marriages lawful except those forbidden by the law of God, as contained in Lev. xviii. Interpreting these provisions, it is the law of Scotland that as regards consanguinity all persons related in the ascending or descending line, however remotely, are forbidden to marry; and in the collateral line, brother and sister, uncle and niece, nephew and aunt, whether on the father or mother's side, are forbidden to marry. The Scripture is silent as to, and no case has yet been decided, whether granduncle and grandniece, grandaunt and grandnephew, can intermarry.²

As affinity, marriages are forbidden between a man and his deceased wife's sister or deceased brother's widow.³ In fact, so strong is this prohibition, that in a case where a man had married in England his deceased wife's sister, previous to Lord Lyndhurst's Act, and no decree of nullity had been obtained in the life of the parties, so that the issue were legitimate in England, yet the Scotch Law, as laid by the House of Lords on appeal, refused to recognise such issue as legitimate, and declared them unable to inherit land in Scotland.⁴ More distant relations by affinity, such as an uncle's widow, are also forbidden. The prohibitions apply to the half-blood as well as full-blood, both as to consanguinity and affinity,

¹ In 1705 a woman was executed for marrying her deceased sister's husband, *Tounahill v. Drysdale*, 1 Hume, 449; and as late as 1846, an uncle and niece who had intermarried were sentenced to fourteen years transportation, the Lord Advocate having restricted the libel from the criminal part, *R. v. Stewart and Wallace*, 2 Broun's Justiciary Reports, 540, cited 3 Macq. H. L., 534.

² Fraser on Husband and Wife, 2nd ed., vol. i., pp. 104-119.

³ *Ib.*, pp. 119-130.

⁴ *Fenton v. Livingstone* (1859), 3 Macq. H. L., 497.

and include illegitimate relations, it appears. But carnal intercourse does not create affinity.¹

Lord Lyndhurst's Act does not apply to Scotland.²

SEC. 5.—LEGITIMACY

(a) *General*

Children born of a mother who was at the time of the marriage lawfully married are legitimate, and this presumption of legitimacy (*pater est quem nuptiæ demonstrant*) can only be rebutted, as in England, by very strong evidence.³

Also by a principle of the Scotch Law, children of a void marriage may be legitimate if the putative marriage was contracted *bonâ fide* by one party.⁴

(b) *Legitimatio per subsequens matrimonium*

Children born bastards, *i.e.*, the result of intercourse of unmarried persons, may be legitimated by the subsequent marriage of their parents. But it seems that in order that legitimation may take place, it is essential that the parents, at the time of the conception or birth of the child, should have been under no legal impediment to intermarry. So children born *ex damnato coitu* out of

¹ Fraser on Husband and Wife, 2nd ed., vol. i., pp. 130-134.

² 5 & 6 Will. IV, c. 54, s. 3.

³ Barclay's Digest; Bell's Principles, secs. 1624, 1626; Bell's Dictionary, tit. Legitimacy; *Gardner v. G.* (1877), 2 App. Ca., 723; *Reid v. Mill* (Feb. 8, 1879), 6 R., 659; *Montgomery v. M.* (Jan. 21, 1881), 8 R., 403; *Tennent v. T.* (July 18, 1890), 17 R., 1205; Fraser on Parent and Child, 2nd ed., pp. 1 and seq., chap. i.; and see *ante*, Chap. III, pp. 146-162.

⁴ Bell's Principles, sec. 1625; Bell's Dict., tit. Legitimacy; Fraser on Parent and Child, *ubi sup.*, p. 22. The same is the rule of the Canon Law; see Sanchez, bk. iii., disp. 42, 43; and of the Code Napoleon, Code Civil, Articles 201, 202.

an adulterous intercourse cannot, according to this principle, be legitimised by the subsequent marriage of their parents.¹ A deathbed marriage is sufficient to legitimise the previously born issue.²

If the father is domiciled in Scotland (either at the time of the birth of the child or of the subsequent marriage, it is doubtful as to the date at which the domicile must be ascertained), neither the place of the child's birth, nor of the subsequent marriage, nor both, are material. So if a domiciled Scotchman has an illegitimate child born in England, and then marries the mother in England, or in any other country outside Scotland, still such child will be legitimated by the law of Scotland;³ but if the father is domiciled in England, although by birth a Scotchman, and the marriage be solemnised in Scotland, still the child is by the law of Scotland illegitimate.⁴

SEC. 6.—MATRIMONIAL OR CONSISTORIAL LAW AND REMEDIES

(a) *General*

Previous to the Reformation matrimonial causes, including legitimacy, were in Scotland, as in most of the

¹ Fraser on Parent and Child, 2nd ed., chap. ii., p. 32; Bell's Principles, secs. 1626, 1627; Bell's Dictionary, tit. Legitimacy.

² *Lauderdale Peerage* case (1885), 10 App., 692; *M'Adam v. Walker* (1813), 1 Dow, 148.

³ *Munro v. M.* (1840), 7 Cl. & F., 842; *Udny v. U.* (1869), L. R., 1 Sc. & D., 441; the *Lauderdale Peerage* case (1885), 10 App. Ca., 692; the decision in *Sheddan or Shedden v. Patrick* (1803), 1 Macq., 535, L. R., 1 Sc. & D., 470, must have gone on the fact that the domicile of the father was in a country where there is no legitimation; see Fraser on Parent and Child, 2nd ed., chap. iii., pp. 45 and seq.; and see, too, an article in the Law Times, Nov. 16, 1889, vol. lxxxviii., p. 42., and *ante*, pp. 527-529.

⁴ *Munro v. Saunders* (1832), 6 Bli., N. S., 468; *Strathmore Peerage*

rest of Europe, subject to the Ecclesiastical tribunals, *i.e.*, tried in the Bishops Courts, by judges known as "commissaries" or "officials," with an appeal to the Rota at Rome. At the Reformation in 1563, the Commissary Court of Edinburgh was established, with jurisdiction over all Scotland in cases of marriage, divorce, and bastardy. The appeal from the Commissary Court was to the Court of Session. The way in which the Commissary judges acted was much complained of, because of the delays in justice and extortion in fees. In 1830, by 11 Geo. IV, and 1 Will. IV, c. 69, ss. 31-37, the matrimonial jurisdiction of the Commissary Court of Edinburgh was abolished and transferred to the Court of Session.

How far the Canon Law as a body was in force in Scotland is a matter of discussion. The law now administered is much the same as that in force before the Reformation, *i.e.*, based on Scottish provincial councils, the Canon Law modified by statute and interpreted by the Courts.¹ This law and these actions are known as "consistorial."²

(b) Nullity of Marriage

A marriage can be declared null, in the same way as in England, on account of similar diriment impediments, such as nonage, insanity, non-consent, previous marriage, and relationship.³

case (1821), 6 Paton, App., 645, where the domicile of the father, the birth and the subsequent marriage being English, the child was held disentitled to inherit a Scotch peerage; and see *ante*, pp. 527-529.

¹ See Fraser on Husband and Wife, introductory chapter.

² *Ib.*; and see 24 & 25 Vict., c. 86, s. 19; and see Fergusson's Reports in the Consistorial Courts of Scotland.

³ Bell's Principles, secs. 1523, 1525, 1527; for instances of lack of consent, see *ante*, pp. 534-551; as to relationship, see *ante*, p. 548; see Fraser on Husband and Wife, 2nd ed., vol. i., pt. i., chap. i., Impediments to Marriage, and chap. ix.; and see *ante*, in this book, Chap. II, s. 2, pp. 23-34, and Chap. VI.

Impotence is also a ground for nullity; but the suit must be instituted by one of the parties.¹

There is also an impediment peculiar to the law of Scotland, the impediment of adultery. By the Act of 1600 all marriages contracted with the paramour by persons divorced on account of his and her own adultery, are null and void, and the issue illegitimate. But in order that such adultery may be a bar, it must be judicially established by a decree of divorce by a Scotch Court, in which decree the paramour must be named.² In other cases an adulterous intercourse may ripen into marriage (see *ante*, pp. 542-546).

The validity or invalidity of marriage may be established by a decree or declarator of marriage, of declarator of nullity of marriage, declarator of legitimacy and bastardy, declarator of putting to silence.³

Damages.—A woman entrapped into marriage with a man already married, is entitled to damages from the person guilty of the wrong, and in one case £2000 was awarded.⁴

(c) *Divorce a vinculo*⁵

Previous to the Reformation marriage was indissoluble.

¹ Bell's Principles, sec. 1524; Fraser on Husband and Wife, 2nd ed., chap. i., sec. 3, p. 81; and see *G. v. M.* (1885), 10 App. Ca., 171; and see *ante*, Chap. V.

² Bell's Principles of the Law of Scotland, sec. 1526; Fraser on Husband and Wife, 2nd ed., vol. i., pt. i., chap. i., sec. 6, p. 140. By Canon Law adultery is a "crimen," which is diriment impediment to marriage; see *ante*, Chap. XVI, p. 493. As to the adulterer being made co-defender, see p. 554.

³ Fraser on Husband and Wife, 2nd ed., vol. ii., pt. vi., sec. 2, p. 1238.

⁴ *Ib.*, p. 139.

⁵ For statistics of divorces in Scotland between 1857-88, see Parl. Paper, 1890, 162; the average number of divorces granted for ten years, since 1879, is seventy-nine to eighty per annum. The Lord Advocate has never intervened. For divorces between Nov. 1836 to Nov. 1841, see Report of Divorce Commission, 1852, 3 [1604],

On the Reformation of religion, which, as recognised by law, took place August, 24, 1560—

Divorce for adultery by husband or wife, though not introduced by statute, was held by the Courts to be part of the Common Law of the country.

Condonation, or *remissio injuriarum*, connivance, *lenocinium*, or collusion, is a bar to the remedy. But recrimination or similar offence committed by the complainant, or cruelty or desertion by the complainant, is no bar. Damages may be claimed against the adulterer, who by 24 & 25 Vict., c. 86, s. 7, may be made a co-defender.¹

Notour adultery by Act of 1551, c. 12, of 1563, c. 10, and of 1581, c. 7, was punishable with death; but these statutes and the penalty for them are now obsolete.

Divorce for Desertion.—By the Act of 1573, c. 1, as interpreted by the Scotch Courts, wilful and malicious desertion by either spouse, persisted in for four years, is a ground of divorce *a vinculo*.²

Jurisdiction.—Owing to the jurisdiction assumed by the Scotch Law, it sometimes happens that persons whose marriage has been dissolved by a Scotch divorce are held

pp. 73, 74; during these five years ninety-five divorces *a vinculo* were granted, of which more than a third were at the suit of the wife. Almost all the litigants were of the humbler classes, only one of the Scotch gentry being in the list.

¹ Fraser on Husband and Wife, 2nd ed., vol. ii., pt. v., pp. 1129 and seq.; Bell's Principles, secs. 1530-1534; but condonation in Scotch Law is final, and not subject to revival; *Collins v. C.* (1884), 9 App. Ca., 205; and see *ante*, Chap. VII, p. 272. If the paramour co-defender is named in the decree, he cannot marry the adulterous wife, see *ante*, p. 553.

² Fraser on Husband and Wife, 2nd ed., vol. ii., pt. v., pp. 1207-1215; 24 & 25 Vict., c. 86, s. 11; and see Bell's Principles, sec. 1535; *Paterson v. P.* (1850), 3 H. L. C., 308; *Harvey v. Farquhar* (1872), L. R., 2 H. L., Sc. & D., 192; *Watson v. W.* (March 20, 1890) 17 R., 736.

in England still under the bond of the prior marriage, though in Scotland they are free to remarry. For it is Scotch Law that a sentence of divorce may be pronounced by a Scotch Court between persons domiciled outside Scotland, but residing there for some short period, as it is said, forty days, or perhaps simply resorting there for the express purpose of obtaining a divorce. But the English doctrine, that the English Court will only recognise a foreign divorce between persons *domiciled* in the country whose Courts grant such divorce, results in a conflict of law between England and Scotland.¹

Custody of children and aliment may be provided for on a decree for divorce or separation in a similar way as in England.²

(d) *Separation*³ and *Law Burrows*

A decree of separation analogous to judicial separation may be obtained by either spouse for adultery or cruelty.⁴ If husband or wife, while still cohabiting, wish to obtain protection against the violence of the other, he or she can swear a law burrow against the offender, and then such

¹ See Report of Marriage Commission, 1868, pp. v, xxvi; Fraser on Husband and Wife, 2nd ed., pt. vii., chap. ii., pp. 1271 and seq.; *Warrender v. W.* (1835), 2 Cl. & F., 488; *Pitt v. P.* (1864), 4 Macq., 627; *Harvey v. Farnie* (1882), 8 App. Ca., 43; *Low v. L.* (Nov. 19, 1891), 19 R. 115; *Bonaparte v. B.* (1892), the Times, Aug. 1, p. 9, Aug. 2, p. 10; and see *ante*, Chap. XVII, pp. 525-527.

² 24 & 25 Vict., c. 86, s. 9; *Symington v. S.* (1875), L. R., 2 Sc. & D., 415; *Thomson v. T.* (July 3, 1890), 17 R., 1091; and see Chap. XI.

³ For Statistics of Judicial Separation in Scotland from 1857 to 1888, see Parl. Paper, 1890, 162: about fourteen or fifteen per annum are granted.

⁴ Fraser on Husband and Wife, 2nd ed., vol. ii., pt. iii., chap. iii., pp. 877 and seq.; Bell's Principles, secs. 1540, 1540a; the leading case in which cruelty was defined by the House of Lords is *Paterson v. P.* (1850), 3 H. L. C., 308,

offender must give caution not to ill-use the complaining spouse.¹

(e) *Adherence*

The Scotch equivalent to the English action for restitution of conjugal rights is a claim for adherence which is competent to husband and wife; but, unlike the English action, it never could be enforced by imprisonment.²

SEC. 7.—PROPERTY AND DIVORCE

Originally in Scotland, as in England, the goods of the wife belonged to the husband. This was termed *communio bonorum*, but it did not include *heritable subjects* in land, etc., or *paraphernalia*, woman's dress, etc., or the wife's *peculium*. The Married Women's Property (Scotland) Act, 1881, much on the lines of the English Act, gives the wife back her own property.³ The rights of either spouses in the other's property after death are not here discussed.⁴

The effect of *divorce* on property, whether it be for desertion or adultery, is, that the innocent spouse is entitled to all legal rights as if the other had died, and the guilty spouse forfeits all claims under a marriage settlement or by way of succession.⁵

¹ Fraser on Husband and Wife, 2nd ed., vol. ii., pt. iii., chap. iii., p. 910.

² *Ib.*, chap. ii., p. 867.

³ 44 & 45 Vict., c. 21; and see English Law, Chap. IV, s. 2, pp. 184-191.

⁴ See Manual in this series on Succession, by J. Williams.

⁵ *Harrey v. Farquhar* (1872), L. R., 2 Sc. & D., 192; Fraser on Husband and Wife, 2nd ed., pt. v., sec. 2, p. 1216.

CHAPTER XIX

IRELAND

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SEC. 1.—MARRIAGE

(a) *History of the Law of Marriage*

The Common Law of England and Ireland are the same, and by this marriages celebrated by an ordained clergyman of the United Church of England and Ireland, or by a clergyman of the Church of Rome, were valid, even although irregularly solemnised in a private house and without banns, etc.¹

¹ *Stockbridge v. Quicke* (1853), 3 C. & N., 305; *Smith v. Maxwell* (1844), 1 C. & P., 271; *Adams v. A.* (1858), 1 Dr. t. Nap., 247; as to Roman Catholic marriages, see *ante*, p. 78, *post*, p. 562.

Marriages by any Nonconformist minister, not episcopally ordained, or *per verba de præsenti*, were void, as was decided in 1843 by the House of Lords ;¹ but an Act was immediately passed validating existing marriages previously celebrated by Presbyterian or Protestant Dissenting ministers, except where such marriage had previously been declared void by any Court of competent jurisdiction, or if either of the parties had lawfully intermarried with any other person, or any marriage as to which there was then pending a criminal proceeding.²

Popery Acts.—Numerous Acts for the repression of Popery were passed in the last century, imposing penalties on Roman Catholic clergymen celebrating marriages between Protestants and Roman Catholics. And 19 Geo. II, c. 13, declared all marriages celebrated by a Roman Catholic clergyman, between a Protestant and a Catholic, were null and void. This provision of this Act was not repealed till 1870, by 33 & 34 Vict., c. 110, s. 39.³ When the validity of a marriage was in litigation under the nullifying provision of the Act, evidence was continually produced as to whether the party was a Protestant or a Roman Catholic ; and the question of the effect of an occasional profession of Protestantism or Roman Catholicism was often considered.⁴

Marriages by a Roman Catholic clergyman between the parties, both of whom were Roman Catholics, were valid if duly celebrated.⁵

¹ *R. v. Millis* (1843), 10 Cl. & F., 534 ; *Beamish v. B.* (1859), 9 H. L. C., 274.

² 5 & 6 Vict., c. 113 ; and see 6 & 7 Vict., c. 39 ; 7 & 8 Vict., c. 81, s. 83, by which latter Act permanent provision was made for marriages by Protestant Nonconformists, as to which, see *post*, pp. 560, 561.

³ See *Yelverton v. Longworth* (1864), 4 Macq. H. L., 745 ; *R. v. Taggart* (1846), 2 Cox C. C., 50.

⁴ See *Kirwan v. K.* (1826), Batty, 712.

⁵ *Bruce v. Burke* (1825), 2 Add., 471 ; and see pp. 78, 557, 562.

(b) Existing Law of Marriage

*Protestant Episcopalians.*¹—The Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870, provided that marriages between persons, both of whom are Protestant Episcopalians, might be solemnised in any church or chapel in which marriages might, at the passing of the Act, be solemnised, and where divine service continues to be performed, or in a church or chapel subsequently licensed by a bishop of the said Church for the solemnisation of marriages. The ceremony of marriage must be preceded by (a) publication of banns, according to their existing law; (b) or a licence or special licence under the Act from a bishop of the said Church, the licence to cost five shillings; or (c) a certificate from the registrar.² A bishop of the said Church can grant a licence, but not a special licence, when one only of the parties intending to marry are Protestant Episcopalians.³ If the marriage is after a special licence, a registrar's certificate for registration purposes must also be produced to the solemnising clergyman.⁴

Further, the marriage is otherwise regulated according to law then existing.⁵ This law, which was contained in two Acts, 7 & 8 Vict., c. 81, and 26 & 27 Vict., c. 27, is generally analogous, in its provisions as to banns, licences, etc., to that contained in the English Act, 4 Geo. IV, c. 76 (see *ante*, Chap. II, pp. 34–77), except that the only nullifying clause is that if any persons knowingly

¹ This is the proper name for members of the Disestablished Church of Ireland, therein and hereinafter referred to as "the said Church," of the Church of England, the Episcopal Church of Scotland, and of any other Protestant Church; see 33 & 34 Vict., c. 110, s. 4, and 36 & 37 Vict., c. 16, s. 2.

² 33 & 34 Vict., c. 110, ss. 32–36.

³ *Ib.*, ss. 35 and 36; 34 & 35 Vict., c. 49, s. 26.

⁴ 34 & 35 Vict., c. 49, s. 22; see *post*, pp. 564, 565.

⁵ 33 & 34 Vict., c. 110, ss. 32–36, 42.

and wilfully intermarry in any other place than in the church or chapel in which the banns have been published or specified in the licence, or in the notice to the registrar and the registrar's certificate, the marriage is void.¹

It should be noted that the above generally refers to marriages where *both* parties are Protestant Episcopalians.

Protestant Nonconformists.—The moderator, chairman, president, head clerk, or secretary respectively of fourteen different Protestant Nonconformist bodies is empowered to grant a *special* licence in case the parties to whom special licence is granted are *both* members of the same Church as the moderator, etc., granting the same.²

As regards *Presbyterians*—

“Marriages between parties, both of whom are Presbyterians, may be solemnised according to the forms used by Presbyterians, either by the licence of a Presbyterian minister, or by publication of banns, as hereinafter respectively mentioned, in meeting-houses to be certified, as hereinafter mentioned, between 8 A.M. and 2 P.M., with open doors, and in the presence of two or more credible witnesses; and marriages between parties, of whom one only is a Presbyterian, may be solemnised according to the same forms by such licence of a Presbyterian minister in such meeting-houses between the same hours, with open doors, and in the presence of two or more credible witnesses: provided that in either case there be no lawful impediment to the marriage of such parties.”³

The Act contains provisions somewhat similar to 4 Geo. IV, c. 76 (see Chap. II, pp. 34–77), as to publication of banns, and granting of licences, and certifying of meeting-houses, such powers being lodged in the Presbyterian minister and the Presbytery.⁴ And in this case of a Presbyterian marriage, the registrar's certificate is not wanted,⁵ and the registrar is forbidden to grant a licence.⁶

*All other Religious Bodies*⁷ except Roman Catholics can only solemnise marriages in the similar manner to

¹ 7 & 8 Vict., c. 81, s. 49; and see *Courtenay v. Miles* (1876), 1. R., 11 Eq., 284.

² 33 & 34 Vict., c. 110, s. 37; 34 & 35 Vict., c. 19, s. 21.

³ 7 & 8 Vict., c. 81, s. 4.

⁴ *Ib.*, ss. 5–11, 19, 20.

⁵ 7 & 8 Vict., c. 81, s. 13.

⁶ *Ib.*, s. 21.

⁷ 36 Vict., c. 16, s. 1.

that provided for Nonconformists in England under 6 & 7 Will. IV, c. 85 (see *ante*, Chap. II, pp. 78–97). That is to say, the parties must have obtained the registrar's certificate or licence; the marriage must take place in a licensed building, by the minister of the church, between 8 A.M. and 2 P.M., with open doors, and in the presence of two or more credible witnesses, and repeating, as some part of the service, the same specified form of words. But, unlike the English Act, the registrar need not be present at the marriage.¹ Marriages celebrated under these Acts are to be good and cognisable.²

The Act contains the following nullifying clause:—

“If any persons shall knowingly and wilfully intermarry in any other place than the certified Presbyterian meeting-house in which the banns of matrimony between the parties shall have been duly and lawfully published, or specified in the licence, where the marriage is by licence, or the registered building or office specified in the registrar's notice and certificate as aforesaid, or without due notice to the registrar, or without certificate of notice duly issued, or without licence from the registrar, in case such notice or licence is necessary under this Act, or if any person shall knowingly and wilfully intermarry in any certified Presbyterian meeting-house without publication of banns, the marriage of all such persons shall be null and void.”³

Quakers and Jews.—These religious bodies have been the subject of special legislation in Ireland as well as in England. Quakers and Jews can, when both parties are Quakers or Jews respectively, marry by their own forms after notice to, and licence or certificate by, the registrar;⁴ and such certificate must be delivered to the solemnising minister.⁵

¹ 7 & 8 Vict., c. 81, ss. 26–29; 26 & 27 Vict., c. 27, ss. 7, 8, 12, 13.

² *Ib.*, s. 42; 26 & 27 Vict., c. 27, s. 8.

³ *Ib.*, s. 49; and see *Courtenay v. Miles* (1876), I. R., 11 Eq., 284.

⁴ 7 & 8 Vict., c. 81, ss. 12, 13; 26 & 27 Vict., c. 27, s. 3 (4); 34 & 35 Vict., c. 49, s. 28; as to marriage where only one of the parties is a Quaker, see 23 & 24 Vict., c. 18; 35 & 36 Vict., c. 10.

⁵ *Ib.*, s. 26; as to special licences for Quakers, see 33 & 34 Vict., c. 110, s. 37.

Roman Catholics.—According to the Common Law of Ireland a Roman Catholic clergyman could always celebrate a valid marriage according to their own rites between persons both of whom were Roman Catholic, publicly or privately in any place, and with or without licence.¹ The Popery Acts declared void any mixed marriages celebrated by a Roman Catholic priest (see *ante*, p. 558); but this statutory prohibition was repealed in 1870, and certain statutory conditions laid down for mixed marriages by a Roman Catholic clergyman (see *post*, p. 563). But marriages by a Roman Catholic clergyman between persons, both of whom are Roman Catholic, are untouched by, or exempted from, any statutory regulation.² A notice to the registrar is not required for a marriage by a Roman Catholic clergyman.³

By the Canon Law of the Roman Catholic Church, under the decree *Tametsi* of the Council of Trent, which is published throughout Ireland, the presence of the priest of the parish of one of the parties is, unless properly dispensed, necessary to the validity of the marriage.⁴ But the law of Ireland takes no notice of these canonical requirements, and it is said that a marriage between two Catholics in the presence of any Roman Catholic priest in Ireland, although contrary to and invalid by the Roman Catholic Canon Law, would be valid.⁵ So where parties related canonically in the third degree of consanguinity, *i.e.*, two cousins being great-grandchildren of the same great-grandparents, married without a proper dispensation, such a marriage being by Canon Law voidable, was, nevertheless, held valid in a bigamy prosecution.⁶

¹ See Report of Royal Commission on Marriage, 1868, p. xii; *Bruce v. Burke* (1825), 2 Add., 471; *R. v. Oryill* (1839), 9 C. & P., 80; and see *ante*, pp. 78, 557.

² 7 & 8 Vict., c. 81, ss. 3, 13, 45, 49.

³ *Ib.*, s. 13.

⁴ For Canon Law of Roman Catholic Church, see Chap. XVI.

⁵ Report of Royal Commission on Marriage, 1868, p. xiii.

⁶ *R. v. Burke* (1843), 3 Cr. & D., 96; 5 Ir. L. R., 549.

Mixed Marriages.—Previous to 1870 a Roman Catholic clergyman could only celebrate a valid marriage when both the parties were Roman Catholics (see *ante*, p. 558). The Church of Ireland, being a National Church, could marry persons of any religion. By The Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870, following the Irish Church Act, 1869, disestablishing the Church of Ireland, it was enacted that a Protestant Episcopalian clergyman, or a Roman Catholic clergyman, may solemnise marriage in cases where only one of the parties is a Protestant Episcopalian, or a Roman Catholic respectively, under the following conditions:—That (a) notice is given to the registrar, and his certificate issued, unless the marriage is after a licence, or special licence issued, or banns published; (b) such certificate is delivered to the clergyman at the time of solemnisation; (c) the marriage is solemnised in a building set apart for divine service according to the rites of the religion of the solemnising clergyman, and in the registrar's district; (d) with open doors; (e) between 8 A.M. and 2 P.M., in the presence of two or more credible witnesses.¹ But—

“Any marriage solemnised by a Protestant Episcopalian clergyman between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, or by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, shall be *void* to all intents in case where the parties to such marriage knowingly and wilfully intermarried without due notice to the registrar, or without certificate of notice duly issued, or without the presence of two or more credible witnesses, or in a building not set apart for the celebration of divine service according to the rites and ceremonies of the religion of the clergyman solemnising such marriage.”²

And in any such mixed marriage either a bishop of the said Church or a bishop of the Roman Catholic Church,

¹ 33 & 34 Vict., c. 110, s. 38.

² 33 & 34 Vict., c. 110, s. 39.

or their respective surrogates, may issue a licence for a marriage by a Protestant Espiscopalian or a Roman Catholic clergyman respectively, although only one of the parties intending to be married is a Protestant Episcopalian or a Roman Catholic respectively; and where such licence is issued it shall not be necessary to obtain a registrar's certificate.¹ But where there is a special licence, a registrar's certificate must, for registration purposes, also be produced to the solemnising clergyman.²

Civil Marriages.—In 1844 provisions for civil marriage similar to those contained in the English Act, 6 & 7 Will. IV, c. 85, were enacted by establishing registrars, to whom notice of marriage in certain form was given, and whereon the registrar issued his licence or certificate. After the issue of licence or certificate the marriage could take place, either in a certified religious meeting-house (see *ante*, p. 561) or before the registrar himself.³ For the nullity clause, see *ante*, p. 561.

(c) *Registration*

Every Protestant Episcopalian clergyman, Presbyterian or other Nonconformist minister, registering officer of Quakers, or secretary of Jewish Synagogue, or registrar, solemnising or assisting at the solemnisation of a marriage, is bound under penalties to register the same.⁴ For Roman Catholic marriages the parties are to procure from the registrar a certificate, filled up by him, and on the marriage it is to be signed by the parties, the witnesses, and the solemnising clergyman, and returned to the registrar.⁵

¹ 34 & 35 Vict., c. 49, ss. 25-27. ² *Ib.*, s. 22; and see *ante*, p. 559.

³ 7 & 8 Vict., c. 81; 26 & 27 Vict., c. 27; 33 & 34 Vict., c. 110, s. 41.

⁴ 7 & 8 Vict., c. 81, ss. 64, 66; 23 & 24 Vict., c. 18, s. 2; 26 & 27 Vict., c. 27, s. 9; where such marriage is by special licence, the registrar's certificate must be obtained, etc., as in Roman Catholic marriages in order that the marriage may be registered; 34 & 35 Vict., c. 49, ss. 22, 23.

⁵ 26 & 27 Vict., c. 90, ss. 11-13.

SEC. 2.—MATRIMONIAL REMEDIES

(a) *Nullity and Restitution*

The same disabilities as to nonage, consent, impotence, lunacy, relationship, etc., exist in Ireland as in England.¹

And for similar causes and similar ways as in England, a decree of nullity can be obtained from the Probate and Matrimonial Division.²

A declaration of legitimacy similar to that obtainable in England may, under the Legitimacy Declaration Act, Ireland, 1868, be obtained from the Probate and Matrimonial Division.³

Also, a decree for restitution of conjugal rights can be obtained from the Probate and Matrimonial Division for the same causes and in the same way as in England.⁴ But as to the enforcement of such decree, the Matrimonial Causes Act, 1884, which in England prevented such a decree being enforced by attachment, does not apply to Ireland;⁵ so such decree may still be enforced by attachment. Therefore, if a respondent husband or wife refuses to obey the decree and cohabit, he or she

¹ See *ante*, Chap. II, s. 2, pp. 23-34; 51 Geo. III, c. 37, as to lunatics; and 5 & 6 Will. IV, c. 54, as to marriage within the prohibited degrees being absolutely void, apply to Ireland; as to nullity for impotence, see *A. v. B.* (1877), 19 L. R. Ir., 403, C. A.; *B. v. B.* (1875), I. R., 9 Eq., 551; *B. alias A. v. B.* (1891), 27 L. R. Ir., 587.

² See *ante*, Chaps. V and VI; and as to the constitution of Irish Matrimonial Court, see *post*, pp. 566, 567.

³ 31 Vict., c. 20; see Rules of the Supreme Court of Judicature, Ireland (published in the Statutory Rules and Orders (1891), pp. 676-1194), O., 71. For the English Act, see *ante*, Chap. III, p. 132, and Chap. VI, pp. 225, 226.

⁴ See *D'Arcy v. D'A.* (1887), 19 L. R. Ir., Ch., 369.

⁵ 47 & 48 Vict., c. 68, s. 7.

may be imprisoned until they purge their contempt, *i.e.*, obey, and agree to cohabit.¹

(b) *Divorce a mensa et thoro*

No Irish Court ever had, or now has, the power of granting a divorce *a vinculo matrimonii* so as to allow the parties to remarry. Previous to the disestablishment of the Church of Ireland, matrimonial causes in Ireland were tried in the Ecclesiastical Courts which had jurisdiction, and granted divorces *a mensa et thoro* and alimony on principles similar to those of the Ecclesiastical Courts in England (see *ante*, Chap. I, pp. 9-12).²

The Irish Church Act, 1869, abolished all ecclesiastical jurisdiction in matrimonial matters.³ The following year the Matrimonial Causes and Marriage Laws (Ireland) Amendment Act, 1870, transferred to and vested in Her Majesty all former matrimonial jurisdiction of the Ecclesiastical Courts, and enacted that such transferred jurisdiction should be exercised in a Court of Record, called the Court for Matrimonial Causes and Matters, and that the judge of said Court should be the same person as the judge of the Court of Probate. It further enacted that the Court shall proceed and give relief on principles and rules which shall as nearly as may be conformable to the principles and rules by which the former Ecclesiastical Court was guided. Generally the provisions of the Act and the powers and procedure of the Court were, except as to granting dissolution of marriage, analogous to those of the Matrimonial Causes Act, 1857,

¹ See *ante*, Chap. X, pp. 371-378; and see Rules of the Supreme Court of Judicature, Ireland (published in the volume of Statutory Rules and Orders (1891), pp. 676-1194, O., 70, rules 3, 61.

² Their decisions are reported in "Milward."

³ 32 & 33 Vict., c. 42, s. 21.

(see *ante*, Chap. VIII and XI); and the Court, in trying issues, has the ordinary powers of a Court sitting at Nisi Prius.¹

The Supreme Court of Judicature Act, Ireland, 1877, transferred the jurisdiction of the Court for Matrimonial Causes and Matters to the Probate and Matrimonial Division of the High Court of Justice.² Rules have been made thereunder regulating the practice.³ A *divorce a mensa et thoro* is granted for cruelty or adultery.⁴

(c) *Action for Criminal Conversation*

An Irish husband can bring an action of tort sounding in damages against a man who commits an adultery with his wife.⁵ But if the defendant, the alleged adulterer, is out of the jurisdiction, the plaintiff cannot sue him in Ireland, as service out of the jurisdiction is not allowed in actions of tort.⁶ As, however, actions *crim. con.* are abolished in England, and a domiciled Irishman cannot petition the Probate and Divorce Division in England (see Chap. VII, s. 1 (c), pp. 243, 244), it follows that if the wife of a domiciled Irishman commits adultery with a domiciled Englishman, the Irish husband has no remedy against the English adulterer. If the husband and the

¹ 33 & 34 Vict., c. 110; 34 & 35 Vict., c. 49.

² 40 & 41 Vict., c. 57, ss. 3-6, 21, 26, 34-37, 47, 64, 71.

³ Rules of the Supreme Court of Judicature, Ireland, O., 70; published in the volume for 1891 of the Statutory Rules and Orders, pp. 676-1194.

⁴ As to what is cruelty, see *M'Kever v. M'K.* (1876), 11 Eq., 26; *D'Arcy v. D'A.* (1887), 19 L. R. Ir., Ch., 369. Generally it is granted or barred for the same grounds or reasons as a judicial separation in England (see *ante*, Chap. VIII, pp. 352-348), and has the same effect (see *ante*, pp. 421-427).

⁵ For an account of this action, see *ante*, Chap. VII, p. 255 and seq.; and see *Wilson v. Leonard* (1854), 5 Ir. Jur. O. S., 101.

⁶ Rules of the Supreme Court, O., 11.

adulterer are domiciled in Ireland, it is immaterial where the adultery takes place.¹

(d) *Legislative Divorce*

An Irish husband or wife can only get a divorce *a mensa et thoro* from the Irish Court, which does not enable them to remarry. But either husband or wife can apply to Parliament to pass a Divorce Bill according to the old practice. And in 1886, where an Irish wife petitioned for such a Bill, the House of Lords laid down, that "the same evidence which since the Divorce Act, 1857, enables the Divorce Court to pronounce a decree of dissolution of marriage, will be considered by the House of Lords sufficient ground for passing a Divorce Bill relating to Ireland, where that Act does not apply."²

(e) *Property and Miscellaneous*

The rights and duties of husband and wife as regards property and person are generally the same as in England (see *ante*, Chap. IV, pp. 163–202). The Common Law and the King's Ecclesiastical Law of England were applied, and the Married Women's Property Acts, 1870–1884³ (see *ante*, pp. 184–191), extend to Ireland. In case of desertion the wife can apply for a protection order⁴ or a maintenance order.⁵

¹ See *Brooke v. Bush* (Jan. 15, 1886), Q. B. D., Ireland, *coram* Master Courtenay; in this the adultery was committed on the high seas.

² *Westropp's Divorce Bill* (1886), 11 App. Ca., 294; and see *Hewat's Divorce Bill* (1887), 12 App. Ca., 312; *Gifford's Divorce Bill* (1886), *ib.*, p. 361; *A.'s Divorce Bill* (1887), *ib.*, p. 364; for practice in legislative divorce, see Macqueen's House of Lords' Practice; for causes of dissolution in England, see Chap. VII, s. 1 (d), pp. 244–247.

³ 33 & 34 Vict., c. 93; 37 & 38 Vict., c. 50; 46 & 47 Vict., c. 75; 47 & 48 Vict., c. 14.

⁴ 28 Vict., c. 43, similar to the English Act (see *ante*, pp. 358–364, 425, 426).

⁵ 49 & 50 Vict., c. 52, extends to Ireland (see pp. 360, 361, 368–370).

APPENDIX 1.



MARRIAGES IN CATHEDRALS AND CHAPELS ROYAL.¹

THERE being a commonly received opinion that marriages cannot be solemnised in cathedrals or chapels royal, the author has written to all deans of cathedrals, and the following is the information most courteously laid at his disposal by them or by their direction. In some cases cathedrals are old parish churches; as such they retain their parochial rights unless specially divested. But generally marriages in cathedrals stopped in 1754 by the effect of Lord Hardwicke's Act, 26 Geo. II, c. 33. Quite recently some cathedrals have been licensed by the bishop under 20 Vict., c. 19, s. 9, see pp. 570, 575. There was a Royal Commission appointed in 1882 to inquire into cathedral churches in England and Wales, whose reports are printed as parliamentary papers, but the subject of marriages in cathedrals was not thereby inquired into or reported on.

BANGOR CATHEDRAL is a parish church; the register of marriages beginning in 1673, the bann book in 1783. Communicated by Evan Lewis, the dean.

BBATH ABBEY is the parish church of St. Peter and Paul. Marriages have been solemnised there since 1569, in which year the register begins. Communicated by

¹ For history, architecture, etc., see "The Cathedral Churches of England and Wales," by W. J. Loftie, F.S.A. E. Stanford, 1892.

Thomas Basey, the verger, by direction of Canon Brooke, the rector.

BRISTOL CATHEDRAL is not a parish church or licensed for marriages, but is in the Parish of St. Augustine's. The last marriage solemnised in the cathedral was on March 12, 1754. Communicated by W. Mann, precentor and sacrist.

CANTERBURY CATHEDRAL is a parish church of the precincts called the Ville of Christ Church. Two marriages took place there in January and February 1891, one by banns and one by licence. The register of marriages begins in 1583, and is published by the Harleian Society. Communicated by R. Payne Smith, the dean.

CARLISLE CATHEDRAL. No banns are now published or marriages solemnised in this cathedral. The cathedral and close are extra-parochial. The nave of the cathedral was a parish church until about thirty years ago, when a new church was built for the parish (St. Mary) which had used the nave. Communicated by W. G. Henderson, the dean.

CHESTER CATHEDRAL. The south transept of the cathedral was the parish church of St. Oswald till 1881, and in it marriages for that parish were solemnised; after which date its rights and emoluments were transferred to a newly-built church. Except as for this the cathedral and its precincts are extra-parochial, and since 1753 no marriages have been solemnised in it except by special licence till 1869. It was then licensed for marriages by the bishop, December 23, under 20 Vict., c. 19, s. 9, empowering the bishop in the case of a church locally situated in an extra-parochial place to authorise in it publication of banns and solemnisation of banns for persons residing in such an extra-parochial place. Communicated by John L. Darby, the dean.

CHICHESTER CATHEDRAL. Banns are now published and marriages solemnised in this cathedral. The register begins in 1863; previous to that marriages were solemnised in the sub-deanery church. The cathedral is the parish church of the close, of which the dean is the vicar. Communicated by F. Pigou, the dean.

DURHAM CATHEDRAL. No answer.

ELY CATHEDRAL. Licensed for celebration of marriages about twenty-five years ago, at which date the register begins. It was not a parish church. Communicated, with the consent of the dean, by W. E. Dickson, sacrist of Ely Cathedral, and vicar of the Parish of the College of Ely.

EXETER CATHEDRAL is the parish church of the precinct of the close. The register of marriages begins October 29, 1597. Communicated, with the consent of the dean, by William David, priest-vicar of Exeter Cathedral, dean's vicar of the close.

GLOUCESTER CATHEDRAL. No marriages except by special licence have been solemnised in the cathedral since the Marriage Act, 1754, 26 Geo. II, c. 33. Previous to that marriages were solemnised in it, and there is a register of marriages beginning in 1663, but no bann book. The cathedral is not a parish church. Communicated, with the consent of the dean, by Bernard R. Foster, sacrist of Gloucester Cathedral.

HEREFORD CATHEDRAL. Banns are never published in the cathedral except in the Lady Chapel, which is lent to the congregation of St. John's Parish Church, and used by them under leave from the dean as their parish church. The cathedral is not a parish church except as above, and is situated in the Parish of St. John. Communicated by George Herbert, the dean.

LICHFIELD CATHEDRAL is a parish church. Banns are published and marriages solemnised in it. The first entry in the bann book is in 1863, the register of marriages beginning in 1665; the earlier records were destroyed in the civil war. Communicated by Edward Bickersteth, the dean.

LINCOLN MINSTER is not licensed for marriages, or a parish church. The minster yard is included in the other parishes. Marriages, therefore, can only take place in the cathedral by special licence. Communicated by W. J. Butler, the dean.

LIVERPOOL CATHEDRAL. Banns are published and marriages solemnised here. The cathedral is also the parish church of Liverpool; the registers date back to 1704. Communicated by Alexander Stewart, the rector.

LLANDAFF CATHEDRAL is a parish church, and banns are published and marriages are solemnised constantly in it. The dean and chapter were formerly charged with parochial functions, till in 1875, when by an Order in Council, August 12th, published in the London Gazette, August 17th, p. 4135, a vicar was appointed and vested with the cure of souls. Notice of banns is to be given to the vicar; they are published by the cathedral clergy, and the marriages solemnised by the vicar. Communicated by C. J. Vaughan, the dean, master of the temple, and taken from the Order in Council.

LONDON, ST. PAUL'S CATHEDRAL, see *infra*, "St. Paul's;" Westminster Abbey, see *infra*, "Westminster."

MANCHESTER CATHEDRAL is the old parish church of Manchester. The register begins in 1575. Marriages are continually being solemnised there. Communicated, with the consent of the dean, by J. M. Elvy, vicar and minor canon.

NEWCASTLE CATHEDRAL is a parish church. The register dates back to 1574. Communicated by A. T. Lloyd, the vicar.

NORWICH CATHEDRAL. One of the side chapels (St. Luke's) and part of the adjoining aisle are used as the parish church of St. Mary in the Marsh in the cathedral precinct, and marriages of parishioners are solemnised there in the usual way after banns or licence. Except in this place, marriages can only take place in the cathedral after special licence. Communicated by W. T. Bensly, chapter clerk, at the request of the dean.

OXFORD, CHRIST CHURCH CATHEDRAL. The earliest register in the Chapter House at Christ Church is a small parchment folio, bound in rough calf, and stamped with the arms of the House. On one of the first pages is written this title, "The booke of Christ Church in Oxford of all who have been christened, married, and buried since the year of our Lord 1633." The earliest marriage registered in this book is dated July 17, 1642, and the latest March 21, 1754. There is no record of marriages in Christ Church Cathedral between March 21, 1754, and May 2, 1865; the marriage register book supplied under 52 Geo. III, c. 146, is an absolute blank.

Duplicate register books for marriages in the present form, bound in green cloth in accordance with 6 & 7 Will. IV, c. 86, were obtained at some date, and these books are in present use. The earliest marriage that is registered in them is dated May 2, 1865. And the author understands that banns are published and marriages solemnised in the cathedral for persons residing in the precincts or college. Communicated by E. W. Collin, precentor and archdeacon Palmer.

PETERBOROUGH CATHEDRAL. Marriages have been always solemnised in this cathedral. Communicated by M. Argles, the dean.

RIPON CATHEDRAL is and always has been an old parish church. Banns are published and marriages solemnised by the minor canons, who act as vicar priests. The register begins at a very early date. Communicated by W. R. Fremantle, the dean.

ROCHESTER CATHEDRAL. Banns are published and marriages solemnised in the cathedral church. No part of the cathedral is or ever has been a parish church. Communicated by S. R. Hole, the dean.

ST. ALBAN'S ABBEY is an old parish church which retains all its rights. The register of marriages commences in November 1858. Communicated by W. J. Lawrance, archdeacon and rector.

ST. ASAPH CATHEDRAL. No answer.

ST. DAVID'S is an old parish church for a large parish, and banns and marriages have been habitually therein published and solemnised as in any other parish church. Communicated by James Allen, the dean.

ST. PAUL'S CATHEDRAL, LONDON. There is no record of any marriage by banns in this cathedral. Previous to Lord Harwicke's Act, 26 Geo. II, c. 33, 1754, frequent marriages took place, but all by licence or special licence. The register begins in 1697, and goes down to 1754; but since then only five marriages have taken place, one in 1756, one in 1758, — in 1877 and in 1883 two Lord Mayor's daughters, Miss White and Miss Knight, and in 1883 the dean's daughter, Miss Church. All these five marriages were by special licence. The close or churchyard is in two parishes, and the cathedral is not a parish church, but

extra-parochial. Communicated by R. R. Green, the dean's verger, at the request of the dean.

SALISBURY CATHEDRAL. Banns are published and marriages solemnised in this cathedral. The register begins in 1564. Communicated by H. W. Carpenter, vicar of the choir, with the consent of the dean.

SOUTHWELL MINSTER. The marriage register goes back to 1559, and from time immemorial this church, although collegiate, was also used as the parish church of Southwell. Communicated by Canon J. J. Trebeck, rector of the cathedral church and prebend of sacrista, and sub-dean of the cathedral.

TRURO CATHEDRAL. Part of the old parish church of St. Mary forms the south choir aisle of the cathedral, and is still the parish church; see 50 & 51 Vict., c. 12. In such choir aisle marriages are usually solemnised and banns published, but with certain consents they may under that Act be solemnised and published in the other parts of the cathedral on an additional fee of £25 to the fabric fund. Communicated by Cecil F. C. Bourke, sub-dean and rector of Truro, and quoted from 50 & 51 Vict., c. 12; and see draft statute in the Royal Commission on Cathedrals.

WAKEFIELD CATHEDRAL. Marriages are solemnised and banns published in the cathedral, which is also the parish church (All Saints) of Wakefield, and became the cathedral by Order in Council in May 1888 on the founding of the new see. The register dates from 1613 and the bann book from 1754. Communicated by N. D. J. Stratton, the Bishop of Sodor and Man.

WELLS CATHEDRAL. Banns are published and marriages solemnised in this cathedral. The cathedral is the parish church of the Liberty of St. Andrew. Communicated by G. Buckle, canon and precentor.

WESTMINSTER ABBEY. Marriages are only celebrated in the Abbey by the dean's permission. For marriages celebrate in Henry VII's chapel, see Burn's Parish Registers, pp. 147, 151. Communicated by G. G. Bradley, the dean.

WINCHESTER CATHEDRAL. Previous to Lord Hardwicke's Act, 26 Geo. II, c. 33, 1754, marriages were

solemnised and banns published in this cathedral, and there is a register of marriages beginning in 1603 down to 1754. There is thence no register of marriage till 1869. Then a marriage was solemnised, and there is an entry in the new register in the archdeacon's writing, "The first publication of banns since the cathedral was licensed for marriages, May 10, 1867." Since then there have been fifteen marriages, ten by banns and five by licence. The licence is under 20 Vict., c. 19, s. 9. Communicated by G. W. Kitchin, the dean.

WORCESTER CATHEDRAL. J. H. Hooper, the chapel clerk, states that he is "not aware of banns having been published; and that marriages have been solemnised in the cathedral church, though rarely of late. The register of marriages commences about 1693."

YORK MINSTER. Marriages took place frequently in the cathedral till 1754, the date of Lord Hardwicke's Act, 26 Geo. II, c. 33; since then only two marriages, and they very recent ones, have been solemnised there by special licence. The cathedral stands in the two parishes of St. Maurice and St. Michael, Belfry. Communicated by A. P. Purey Cust, the dean.

CHAPELS ROYAL

ST. GEORGE'S, WINDSOR. Marriages in abundance have taken place here, but in each case of recent years it has been by special licence. There is a special register beginning in the year 1627, or rather a memorandum book, as it is not drawn in the statutable form. In it all marriages, whether Royal or otherwise, are entered. Communicated by Randall T. Davidson, the dean.

THE SAVOY. Marriages cannot be solemnised here. The minister was convicted of so marrying.¹

In Hampton Court, Kensington Palace, and Whitehall Chapels, and at the Chapel Royal, St. James', marriages used to be performed. The register of the latter still exists in the custody of the Bishop of London as Dean of the Chapel Royal.²

¹ *Ex relatione* L. Mansfield, C. J., in *R. v. Northfield* (1781), 2 Douglas, 659.

² Burn's Parish Registers, pp. 147, 148, 151.

THE CHAPELS OF THE INNS OF COURT. These cannot be used for solemnising marriages.¹ A marriage by special licence took place two or three years ago in the Temple church; there is an ancient register of marriages there solemnised, now in the custody of the Master Dean Vaughan. Lord Castleton and Farshen were there married in 1674.² In Gray's Inn and Lincoln's Inn, Rolls, Serjeants' Inn and Staple Inn Chapels, marriages used to take place; and all except the two latter have registers.³

¹ *R. v. Northfield*, *ubi sup.*; *Taunton v. Wyborn* (1809), 2 Campbell, 297.

² Burn's Parish Registers, p. 164. ³ Burn, *op. cit.*, pp. 146-152.

APPENDIX 2



RELIGIOUS OPINIONS AND PRACTICE AS TO DIVORCE AND THE REMARRIAGE OF DIVORCED PERSONS

EARLY CHURCH

“THE opinions of the Fathers, as collected by Cranmer, are thus enumerated by Burnet:—‘Hermes was for putting away the adulteress, but so as to receive her again upon repentance. Origen thought the wife could not marry again after divorce. Tertullian allowed divorce, and thought it dissolved the marriage as much as death did. Euphenius did also allow it; and Ambrose in one place allows the husband to marry again after divorce for adultery, though he condemns it always in the wife. Basil allowed it on either side for adultery. Jerome, who condemns the wife’s marrying, though her husband were guilty of adultery, and who disliked the husband’s marrying again, yet when his friend Fabiola had married after a divorce, he excuses it, saying, it was better for her to marry than to burn. Chromaticus allowed of second marriage after divorce; and so did Chrysostom, though he condemned them in women so divorcing. St. Austin was sometimes for a divorce, but against marriage upon it; yet in his “Retractations” he wrote doubtfully of his former opinion.’ . . . Pope Gregory denied a second marriage to the guilty person, but allowed it to the innocent after divorce. Pope Zachary allowed the wife of an incestuous adulterer to be married if she could not contain. In the Canon Law the Council of Friburg is cited for allowing the like

privilege to the husbands. By the Council of Elvira, a man that finds his wife intends to kill him may put her away and marry another, but she must never marry. The Council of Arles recommended it to husbands whose wives were found in adultery, not to marry during their lives; and that at Elvira denied the sacrament to a wife who left an adulterous husband and married another; but she might have the communion when her first husband died; so the second marriage was accounted good, but only indecent. But the Council of Milesi forbids both man and wife to marry after divorce" (Burnet's History of the Reformation, vol. ii., p. 91, Nares' edition).¹

REFORMATION

The *Reformatio Legum Ecclesiasticarum*, drawn up by Cranmer and sub-Committee of Eight, allowed divorce for adultery by husband and wife, and that the innocent party might marry again. It never became law, but was the recognised opinion and sentiment of the Church of England at the time, and contains the opinions of the first Reformers;² and see Bishop Cozens' argument in the Duke of Norfolk's case, A.D. 1700, which proves conclusively, according to the opinion of most of the Fathers, and in conformity with the opinion of almost all the Reformed divines, that adultery works a dissolution of marriage which justifies the injured party in marrying again.³ John Milton, who may be taken as a representative of Puritan opinion, was in favour of divorce for other causes besides adultery, and allowed either party to remarry. It ought not to be tried by law, but was a matter of conscience, the magistrate only seeing that the pecuniary conditions of the divorce were just and equal.⁴

¹ See Report of Divorce Commission, 1852, 3 [1604], p. 5, n.

² *Ib.*, p. 4; and see Report of Ecclesiastical Courts Commission, 1883 [c. 3760], pp. xxxii, xxxvi; and see *ante*, pp. 8, 11, 12.

³ 13 State Trials, 1332; and the Report of Divorce Commission, 1852, 3 [1604], p. 5, n.

⁴ Milton's Prose Works, "The Doctrine and Discipline of Divorce restored to the good of both Sexes," and "Tetrachordon Expositions upon the four chief places in Scripture which treat of marriage or nullities in marriage."

CHURCH OF ENGLAND

In 1888 there met at Lambeth under the presidency of Dr. Benson, Archbishop of Canterbury, what has been properly called the Lambeth or Pan-Anglican Conference. This Conference, under the style of the archbishops, bishops, metropolitan, and other bishops of the Holy Catholic Church in full communion with the Church of England, one hundred and forty-five in number, put forth an encyclical letter, in which they declared, *inter alia*—¹

“Sanctity of Marriage.—In vital connection with the promotion of purity is the maintenance of the sanctity of marriage, which is the centre of social morality. This is seriously compromised by facilities of divorce which have been increased in recent years by legislation in some countries. We have therefore held it our duty to reaffirm emphatically the precept of Christ relating thereto, and to offer some advice which may guide the clergy of our communion in their attitude towards any infringement of the Master’s rule.

“Polygamy.—The sanctity of marriage as a Christian obligation implies the faithful union of one man with one woman until the union is severed by death. The polygamous alliances of heathen races are allowed on all hands to be condemned by the law of Christ, but they present many difficult practical problems which have been solved in various ways in the past. We have carefully considered this question in the different lights thrown upon it from various parts of the mission-field. While we have refrained from offering advice on minor points, leaving these to be settled by the local authorities of the Church, we have laid down some broad lines on which alone we consider that the missionary may safely act. Our first care has been to maintain and protect the Christian conception of marriage, believing that any immediate and rapid successes which might otherwise have been secured in the mission-field would be dearly purchased by any lowering or confusion of this idea.”

A Committee, consisting of Bishop of Chester, Dr. Stubbs (*Chairman*); Bishop of Bombay, Dr. Mylne; Bishop of Dover, Dr. Parry; Bishop of Durham, Dr. Lightfoot; Bishop of Exeter, Dr. E. H. Bickersteth; Bishop of Huron, Dr. Baldwin; Bishop of Maryland, Dr. Paret; Bishop of Mississippi, Dr. Thompson; Bishop of Quincy, Dr. Burgess; Bishop of Singapore, Dr. Hose, was appointed to consider the subject of divorce, and they made a report; see p. 580.

Besides the encyclical letter, certain resolutions were

¹ See the report published by the S.P.C.K.

formally adopted by the Conference, and among these resolutions the Conference adopted the first three recommendations of the report of the Committee on Divorce as follows :—

“4. (A) That, inasmuch as our Lord's words expressly forbid divorce, except in the case of fornication or adultery, the Christian Church cannot recognise divorce in any other than the excepted case, or give any sanction to the marriage of any person who has been divorced contrary to this law, during the life of the other party.

“(B) That under no circumstances ought the guilty party, in the case of a divorce for fornication or adultery, to be regarded, during the lifetime of the innocent party, as a fit recipient of the blessing of the Church on marriage.

“(c) That, recognising the fact that there always has been a difference of opinion in the Church on the question whether our Lord meant to forbid marriage to the innocent party in a divorce for adultery, the Conference recommends that the Clergy should not be instructed to refuse the sacraments or other privileges of the Church to those who, under civil sanction, are thus married.”

The Committee on Divorce in their report made a fourth recommendation which was not adopted by the Conference ; this recommendation is as follows :—

“4. But whereas doubt has been entertained whether our Lord meant to permit such marriage to the innocent party, the Committee are unwilling to suggest any precise instructions in this matter, and recommend that, where the laws of the land will permit, the determination should be left to the judgment of the bishop of the diocese, whether the clergy would be justified in refraining from pronouncing the blessing of the Church on such unions.”

The resolutions of the Lambeth Conference were not passed into Canons, and therefore have no binding effect on the clergy. It is supposed that Royal Letters of Business would not be granted to empower Convocation to pass them into Canons. However, several bishops have taken them as a guide, and generally follow them, *i.e.*, the Bishops of Ely, Lincoln, St. Albans.

As regards the history of official action on this subject taken by the Convocation of Canterbury, the Bishop of Reading, Dr Randal, has kindly given the author the following valuable and interesting epitome :—

“Upon the passing of the Divorce Acts (and during their passage through Parliament) sundry *gravamina* and *articuli cleri* were presented by the Lower to the Upper House of Convocation of Canterbury. (These may be found in the Chronicle of Convocation.) But though these were adverse to the drift of the Divorce Acts, no action was taken

to preserve the Doctrine and Discipline of the Church. However, in 1873, a Code of Canons for the Church of England, agreed upon by the two Committees of the Provincial Convocations of Canterbury and York, was (in October) submitted to their respective Convocations. Canon 66 of this Code runs thus:—‘Of Divorced Persons.—The Catholic Church hath always held, and this Church doth hold, in the words of the Divine Head of the Church, “That whosoever shall put away his wife except it be for fornication, and shall marry another, committeth adultery; and whoso marrieth her who is put away committeth adultery.” We therefore solemnly admonish all members of this Church not to admit to a second marriage any person who has been found guilty of adultery during the life of the other party.’

“This is equivalent to a sanction of the remarriage of the innocent party.

“These draft Canons were, by request of the Upper House, circulated amongst the clergy, that their opinions thereon might be learned; and these opinions having been gathered through the R. Dec. Chapters, and carefully considered, the two Committees of Canterbury and York reported again, and on February 19, 1879, presented a revised Draft of a Code of Canons, among which stands Canon LXIX: ‘Of the oath or solemn declaration before licence of marriage,’ in which occur the following words:—‘Provided always that no person having ecclesiastical authority to grant such licences shall grant such licence when one of the parties intending marriage shall have been divorced by the sentence of any Court, unless the person from whom such party was so divorced be dead.’ And Canon LXX:—‘Of Second Marriages, and when prohibited.—Whereas this Church has ever held that the bond of holy matrimony cannot be dissolved by any authority of man, teaching that “those whom God hath joined together no man may put asunder,” we do solemnly admonish all members of this Church who are married that they do not contract another marriage, unless the former marriage hath been dissolved by death. And we do also admonish all ministers that they do not solemnise such second marriages without sufficient proof that the former marriage hath been so dissolved.’ These draft Canons were, however, not discussed in the Convocations, and, of course, no Letters of Business in connection with them were applied for or granted. This revised draft, however, is valuable, as showing what was the general opinion of the clergy upon the points.

“In April 1883 a report was presented to the Lower House of Convocation of Canterbury, and the following resolution, based upon it, was proposed:—‘That this House deeply regrets the existence of the Divorce Acts, and the liberty they grant for the remarriage of divorced persons, as tending to lower both the public estimate of the indissolubleness of the marriage bond and the tone of public morals, and also as liable to cause difficulty and embarrassment to the clergy in reference to publishing the banns of divorced persons, and to admitting those who have contracted such a marriage to the Holy Communion.’ The resolution was adopted by the House, with the addition of the following rider: ‘And desires to call the attention of Churchmen to the law of Holy Scripture in this respect, as expressed by the Church in Canon CVII.’ [It may be as well to remember that the existing Canons were themselves constructed after the question of a change in the Canon Law of the West had been raised by the *Reformatio Legum*, which would have introduced a greater freedom of divorce and remarriage.]

“The next step was the presentation, on February 12, 1885, by the Lower House of Convocation of Canterbury, of an *articulus cleri*, praying the Upper House to take into consideration the subject of the remarriage of divorced persons, with a view to the ‘putting forth of a Synodical Declaration on the subject of the law of the Church with respect to marriage, and thus to prevent breakers of the law of the Church, through ignorance of what that law is.’ The President referred that *articulus cleri* to a Committee of the Upper House on April 29, 1885. It consisted of the Bishops of Gloucester and Bristol, Winchester, London, Hereford, Oxford, Lichfield, Llandaff, and Lincoln, and it presented its report to the Upper House on July 10, 1885, but no motion was made on the subject. On May 10, 1887, a message came from the Upper to the Lower House: ‘The Upper House have this day passed a resolution that the President be requested to communicate to the Lower House a copy of the report of the Committee of the Upper House of the last Convocation but one (1885) on the Marriage of Divorced Persons, and then directed to be laid on the table, with permission to discuss it, if they thought fit.’ Thereupon the Lower House resolved—‘That the report of the Committee of the Upper House on July 10, 1885, be referred to the Committee of this House on the present condition of the Marriage Laws.’ The report of the Bishops’ Committee can be found in Chronicle of Convocation. The Lower House Committee met several times, but without producing a final report, owing to great divergence of opinion on the subject of the remarriage of the innocent party. They had the advantage, in dealing with the bishops’ report, of a very careful paper by the late John Walter Lea, prepared by him at the request of the E.C.U.; and also of a paper by Sir W. Phillimore, and another by Canon Hoskin; the three being contained in one pamphlet, published at the E.C.U. Office. While the Committee were still employed over their report, the Lambeth meeting of bishops had appointed a Committee to deal with the question of divorce, and had, upon the report of their Committee, debated the question, and passed resolutions. It was the opinion of the Committee of the Lower House that it would be unseemly if the House of Presbyters were to sit in judgment upon the decision of the Anglican Episcopate, and the Chairman was instructed to move that the Lower House be requested to discharge the Committee of the task of considering the report of July 10, 1885. The House assented.

“I do not give references to the Lambeth report, which can be obtained at S.P.C.K.; but it should be noticed that it varies in somewhat important matter from the bishops’ report in 1885, and tends towards greater strictness.

“No more action was taken by the Convocation of Canterbury until May 1 of this year, when a gravamen on the subject of the issue of marriage licences to divorced persons was presented by Archdeacon Bathurst. It was grounded on an extreme case of irregularity. The Bishop of Ely has forbidden the issue of licences in any case, whether for the guilty or the innocent, within his diocese. But a licence for such a marriage in a parish church in Ely diocese, issued from Doctors’ Commons, in the teeth of the diocesan’s prohibition, and the marriage was solemnised accordingly. The history of this gravamen and matters bearing on it is contained in the report enclosed herewith. The Lower House accepted the resolution appended, and it was sent up to the Upper House, with what result remains to be seen.

“I have gone at length into the history of the action (and inaction) of the Convocation of the Southern Province, because thereby I have

referred you to the Chronicle of Convocation, with the necessary dates. I may mention, further, that in the Chronicle for 1857 and following years may be found a series of very valuable speeches, *pro* and *con*, which really exhaust all that can be said on the subject. You will, doubtless, be acquainted with Mr Woolsey's work, "Divorce and Divorce Legislation," and with the paper by another American writer (Dr Nathan Allen) in the North American Review, June 1880. There is also a good article in Church Quarterly of April 1881. I may perhaps refer you to a paper of my own in the report of the Reading Church Congress (1883), which presents my own view of the subject."

"CONVOCATION OF CANTERBURY, UPPER HOUSE¹

"REPORT OF THE COMMITTEE OF THE UPPER HOUSE ON THE SUBJECT OF DIVORCE

"Presented to the Upper House, Friday, 10th July 1885

"The Committee of the Upper House of Convocation, appointed to consider the *articulus cleri* on the subject of divorce, presented April 29, 1885, report as follows:—

"1. That 'divorce and separation *a thoro et mensa*' is allowed by the Church of England (Canon 107) on the condition that the parties applying for such separation shall engage to live chastely and continently, and shall not, during each other's life, contract matrimony with any other person.

"2. That sentence of divorce *a vinculo matrimonii* has never been pronounced by the Courts of the Church of England, and that her Canons are silent on the subject.

"3. That, in regard of divorce *a vinculo matrimonii* in the case of adultery, the judgments of the early Councils which have enacted Canons on this subject have not been unanimous, some permitting the remarriage of the innocent party, though advising against it, and some prohibiting it.

"4. That the judgment of the early Catholic Fathers has varied on this subject, some allowing the remarriage of the innocent party, and some prohibiting it.

"5. That the judgment of learned members of the Church of England has not always been the same: In the *Reformatio Legum* it was recommended that divorce *a thoro et mensa* should be abolished, and that remarriage of the innocent party should be permitted in the case of adultery.

"6. That the Council of Trent, whilst distinctly prohibiting the remarriage of the innocent party, yet pronounces its anathema not directly against those who permit such remarriage, but against those who affirm that the Church of Rome errs in declaring it to be unlawful.²

"7. That the Greek Church recognises divorce *a vinculo matrimonii*, and allows, but discourages, the remarriage of the innocent party.

"8. That the testimony of Holy Scripture has been adduced on both sides, but it appears that the majority of expositors have held that our

¹ "Divorce and Remarriage, 1885, No. 193." National Society's Depository, Westminster.

² There is historical evidence that the Tridentine Canon was so framed as to meet the case of Greeks under Venetian rule, who claimed liberty to continue their ancient practice.

Lord's words (St. Matt. v. 32, xix. 9) are to be understood as permitting divorce a *vinculo matrimonii* in the one case of adultery. In regard of the question of remarriage, the teaching of Holy Scripture cannot be pronounced to be perfectly clear. It would, however, appear certain that in the case of putting away, for any cause other than adultery, neither party may marry again during the lifetime of the other; and at least highly probable that, in the case of adultery and divorce consequent thereon, the remarriage of the innocent party is not absolutely prohibited.

"Having due regard to these considerations, we advise this House to make the following declaration:—

"1. That, in the case where the sin of adultery shall have been fully proved before a competent Court, and a decree of divorce shall have been obtained, the innocent party, so set free, ought to be advised not to remarry during the lifetime of the guilty party.

"2. That if, however, the innocent party shall remarry, the charity of the Church requires that the ministrations of the Church should not be withheld from the person so remarried, or from the person with whom the marriage shall have been contracted.

"3. That, in the case of the remarriage of the guilty person, the ministrations of the Church ought not to be granted; saving, however, to the bishop the power, after personal investigation, to give such direction, in any case of penitence, as he shall consider most consonant with the teaching of Holy Scripture and the mind and practice of the primitive Church."

The reports of the said Committee of the Lower House of the Convocation of Canterbury on the present condition of the Marriage Laws is as follows:—¹

"Your Committee have taken into consideration the gravamen presented to the Lower House by the Archdeacon of Bedford on Friday, May 1, and by the vote of the House referred to the Committee on the Marriage Laws. The gravamen was as follows:—'Whereas it appears to the undersigned undesirable that the Church should seem to offer special facilities for the marriage of divorced persons by the issue of a marriage licence to them; and whereas there is a diversity of opinion whether it is within the law to refuse such marriage licences; and whereas by the issue of such licences scandal has arisen, and is likely to arise: *Reformandum*: That the undersigned most respectfully requests his Grace the President and their Lordships of the Upper House to take such steps as they in their wisdom may deem fit to prevent such scandals arising.'

"Your Committee have searched the records of Convocation to ascertain what action has been already taken by either House with reference to the subject of the gravamen. They find that on May 2, 1866, an *articulus cleri*, touching the marriage of divorced persons, was presented to the Upper House, and in pursuance of a resolution of that House, was, on July 2, 1868, by order of his Grace the President, referred to a Committee of the Lower House, appointed to consider and

¹ "1891, On the Issue of Licences for Marriage of Divorced Persons, No. 256." Sold at the National Society's Depository, Westminster. Price 2d.

report to Convocation as to any manner in which useful action can be taken thereon. The report of this Committee was presented to the Lower House by the Chairman, the Rev. M. Gibbs, on February 25, 1869, was discussed on the next day, and the following resolution, founded on the report, was passed:—"That the report of the Committee be presented to his Grace the President, and that their Lordships of the Upper House be respectfully requested "to take action" in manner set forth by the Committee." The purpose of this 'action' was, first, to prevent the improper grant of licences; and, second, to test, if necessary, the true state of the law as to the power to refuse licences; and, to secure these objects, and especially the latter, two possible courses were pointed out: "The officers of the Ecclesiastical Courts might be ordered to refuse the grant of a marriage licence to divorced persons. It would in such case be open to the party whose application is so refused to apply for a *mandamus*, and then the law on the point would be laid down by the judges. 2. The bishops might direct and order that whenever a licence is applied for to authorise the solemnisation of the marriage of a divorced person, a *caveat* be entered against its grant. Then the question will come before the Ecclesiastical Court, in pursuance of the provisions of the eleventh section of 4 Geo. IV, cap. 76, which enacts that "if any *caveat* be entered against the grant of any licence for a marriage, such *caveat* being duly signed by, or on behalf of, the person who enters the same . . . no licence shall issue . . . until the judge has certified to the registrar that he has examined into the matter of the *caveat*." The sole object of the Committee seems to have been to point out two ways, in either of which their Lordships might interpose to forbid the issuing the licence, without any risk of injustice, even should the conclusions of the Committee be incorrect. For that their Lordships have the power was plainly, after a careful inquiry, the opinion of the Committee, who reported: 1. That no change in the practice of the Ecclesiastical Courts as to the granting of licences was made by the Divorce Act of 1857. 2. That the language of Canon CI appears to imply that a discretion may lawfully be used with regard to the persons to whom marriage licences are granted, and that the Act of Parliament which empowers the Archbishop of Canterbury to grant licences, viz., 25 Hen. VIII, c. 21, does not require him to grant marriage licences to all applicants for them. 3. That the term used in the form of affidavit leading the licence and in the licence itself, '*prayed* a licence,' seems to intimate that the grant of such licence is a favour conferred on the petitioner, rather than a right which may be demanded by him.¹ . . .

"This report and the resolution were presented to the Upper House on June 15, 1869; whereupon his Grace the President (Tait) advised, and the House ordered, that the question whether ecclesiastical officers are empowered to refuse a licence should be referred to the Vicar-General for his opinion thereon.

"The resolutions of the Lower House were presented to the Upper House again on June 13, 1870, in the form of a second *articulus cleri*, and on June 15 their Lordships heard the opinion of the Vicar-General (Sir Travers Twiss), which was summed up in effect in the following passages (Chron. of Convocation, p. 394). The Vicar-General: 'As a matter of practice the granting of a marriage licence is covered by the Marriage Act of George IV, which superseded the Canon, and gave

¹ For a decision that the issue of a marriage licence is discretionary, see *ante*, p. 48.

directions as to the conditions precedent to the granting of the licence. It is declared that a licence shall not be granted unless certain conditions are complied with by the parties applying . . . if no objection has been taken, and no *caveat* entered, the licence is granted as a matter of course.' The Bishop of Salisbury: 'Of right?' The Vicar-General: 'No, no; as a matter of practice it is granted; but if a *caveat* is entered—if anybody takes the opportunity of entering a *caveat*—he is required to attend and give his grounds,' etc. The Bishop of Chichester: 'There is one question I should like to have answered; whether each bishop, in his own court, has the power and discretion to forbid a licence to issue if he thinks it generally advisable that it should not? Can the bishop say, "My persuasion is that these people should not marry, and, therefore, I will give no facilities to them, and I forbid my chancellor to grant the licence." In any such case would that be a legal act?' The Vicar-General: 'I consider that it is within the power of a bishop to do so.' The Bishop of Winchester: 'Then your judgment is, that a bishop has power to refuse to issue a licence, as the licence is in the nature of a favour?' The Vicar-General: 'Yes.' . . . The Bishop of Winchester: 'What does the ordinary law of licence rest upon? Is it custom or Act of Parliament?' The Vicar-General: 'On the Canon Law. There is no Act of Parliament interfering with the discretion of the bishop.' The Bishop of Winchester: 'Then there can be no doubt it rests in the discretion of the bishop to grant or refuse it. The Canon Law allows the privilege in certain cases of substituting licences for banns, and no Act of Parliament does more than limit the power. It remains, therefore, to decide whether the privilege shall or shall not remain in his name.' The President: 'It must be considered how far a decision of this House, if pronounced, would be binding upon anybody.'

"The subject was resumed on the following day, and a resolution was proposed by the Bishop of Winchester, seconded by the Bishop of London, and agreed to, that 'This House has considered a carefully-prepared report on the remarriage of divorced persons presented to it by the Lower House. This House deeply deplores the scandal and other evils arising from the frequency of divorce, and would highly disapprove of any "favour" being shown, as alleged, towards the remarriage of divorced persons which may have a tendency to encourage such evils. This House does not, however, possess any power of regulating the proceedings of the several bishops in the administration through their courts of their respective dioceses, but each individual bishop here present is ready to give his serious consideration to the grave subject which has thus been brought before this House, and to communicate with the officers of his court thereupon, and so do his utmost to remove the evils of which complaint is made.' This was communicated to the Lower House on June 16, 1871, as the answer to the *articulus cleri*. . . Your Committee desire most earnestly to urge the House to press upon their Lordships the reconsideration of this matter, and such regulation of the issue of licences as shall avoid all possibility of misapprehension as to the judgment of the Church upon the subject of such remarriages, and all scandal arising from such issue. Believing, as they do, that the granting or withholding licences is entirely within their Lordships' discretion, the Committee desire to express their opinion that no licences should be granted for remarriage of a divorced person, whether that person be the innocent or the guilty party. Your Committee ground this opinion (1) on the fact that, in the early Church, though in the judgment of some there is no conclusive

consensus against the lawfulness of the remarriage of the innocent husband, there is a strong consensus, by the admission of all, against the expediency of remarriage even in that case, and a virtual discouragement thereof; (2) on the fact that our own existing Canon CVII distinctly forbids any remarriage in case of divorce; and that the Church of England has never, by any act or judgment of her own, departed from that principle. It appears, therefore, to your Committee to be against the mind both of the primitive Church and of the Church of England, as well as against the judgment of those who have had special and recent experience of the evils resulting to society, that marriage licences, which are matters of favour, should be granted in any case of marriage after divorce.

"Your Committee carefully confine themselves in this report to the special point referred to them, in respect of which no difficulty arises from any collision, real or apparent, between statute and ecclesiastical law. They regard as disastrous any action of the Church herself, in a matter where her action is entirely unfettered, which might seem to show that she thinks lightly of any breach of that which is still her law, though the law of the State has been changed.

"Your Committee recommend for adoption, by the Lower House, the following resolution:—

"That this report be conveyed by the Prolocutor to the Upper House; and that his Grace the President, and their Lordships the bishops, be respectfully requested to take such steps as they in their wisdom may deem fit to discountenance the continuance of the practice of granting licences for the remarriage of divorced persons during the lifetime of the partner of the former marriage.

"Signed on behalf of the Committee,

"J. L. READING,

"*Chairman.*

"*June 29, 1891.*"

In order to ascertain the actual subsisting practice, the author wrote to all the archbishops, bishops, and suffragan bishops of the Church of England, except the Archbishop of Canterbury, the Bishops of Dover, Hull, Barrow-in-Furness, Rochester, Southwark, Sodor and Man, and Coventry, asking if they would give him the benefit, for insertion in this book, of their opinions as to the remarriage by the clergy of divorced persons, *i.e.*, either the innocent party or the guilty respondent with the co-respondent, or the guilty respondent with some stranger, and whether they had laid down any rules for the guidance of their clergy, and whether they issued marriage licences to divorced persons. The author begs to express to their Lordships his thanks for the letters which provide the following information.

The Bishop of Bath and Wells, Lord Arthur Hervey,

D.D., refers, as expressing his general views, to a pamphlet¹ he wrote at the time of the passing of the Matrimonial Causes Act, 1857. He there concludes, pp. 12 and 13—

“From our Lord’s expression in Matt. v. 32 it appears that the husband who divorces his wife on account of fornication does not cause her to commit adultery if she marries again. From Matt. xix. 9 it appears that he who divorces his wife on account of fornication, and marries another, does not commit adultery himself; whereas, in every other case of divorce and remarriage, both the husband who divorces and the wife who is divorced and the man who marries the divorced woman are all adulterous. . . . I think, therefore, I am justified in asserting that it is not declared in the word of God that a marriage with a divorced woman is adulterous (p. 14). I strongly incline, however, to the opinion that such remarriage (between persons who have been guilty of the crime of adultery with each other) ought to be made illegal. . . . (p. 19). The question, whether in any case a woman may divorce her husband, I leave wholly untouched. Scripture is quite silent on it.”

The bishop declines to follow the opinions of S. Jerome and S. Augustine and other writers, as being prejudiced by the ascetic notions of the religious world and their own state of celibacy, and thinks these commentaries contradictory to the Scriptures, and bases his conclusions on Scripture alone.

The Bishop of Bristol, Dr. Ellicott, states that his opinions are exactly coincident with the report of Upper House of Convocation; see *ante*, p. 583.

The Bishop of Ely, Lord Alwyne Compton, D.D., states that generally he would be guided by the resolutions of the Lambeth Conference; see *ante*, p. 580. He would not issue marriage licences to divorced persons.

The Bishop of Lincoln, Dr. King, states that he was a member of the Committee of the Upper House of Convocation on Divorce, whose report is referred to; *ante*, p. 583.

The Bishop of Oxford, Dr. Stubbs, agrees with the four recommendations of the Committee on Divorce of the Lambeth Conference; see *ante*, p. 580. As to marriage licences, he states—“I have not issued any instructions to surrogates on the subject of licences. I issue no such licences directly.”

¹ A Letter to the Rev. Christopher Wordsworth, D.D., Canon of Westminster, on the Declaration of the Clergy. By the Rev. Lord Arthur Hervey, M.A., Rector of Ickworth, with Horringer. John Murray. 1857.

The Bishop of Reading, Dr. Rendall, most kindly gave us an exhaustive answer, which is printed p. 580. As regards his personal action, he states that, not being a diocesan bishop, he has no jurisdiction, and therefore can lay down no rules for the direction of the clergy.

The Bishop of Salisbury, Dr. Wordsworth, refers to his Diocesan Address, 1888, pp. 28, 29. He there states he believes that Matt. v. 32 and xix. 9 allow an innocent husband to put away a guilty wife and marry another.

“But seeing that cases of collusion are very frequent, I cannot permit surrogates to grant marriage licences to divorced persons *in any case*, such licences being, as I explained, of the nature of dispensations or acts of favour to persons who are deserving of them. Should any of you, dear brethren, be asked to remarry such persons, I must ask you to communicate the fact to me.”¹

The other prelates either did not reply or wrote answers stating that they had made no rules, or declined to give any information.

Nonconformists

As to the Baptists, the Rev. Joseph Angus, D.D., President of the Regent's Park College, gives the following information :—

“As a *Body*, we have given no deliverance on the questions you raise. Generally speaking, we accept the decisions of a court of law—even when they run counter to ecclesiastical opinion; and admit the distinction which the law makes between the man and the woman when guilty of unchastity, though deeming the *sin* of unfaithfulness to be alike in both cases. Divorce on grounds of incompatibility of temper and loss of affection we generally deem unscriptural and mischievous. Those who hold these views generally deem them to be consistent with Scripture teaching, rightly interpreted.”

The author wrote to several other prominent Wesleyan and Baptist ministers as to their opinions and practice in remarrying divorced persons, and as to divorce generally, but received no answer.

As regards the Roman Catholics, it is a current notion that they refuse utterly to recognise divorce, or to remarry

¹ Four Addresses delivered to the Clergy and Churchwardens of the Diocese of Salisbury at his Primary Visitation in the months of April and May 1888. By John Wordsworth, D.D., Bishop of Salisbury. Simpkin, Marshall, & Co.

divorced persons. But this idea is not entirely correct, as will appear from the following quotation from a very recent pronouncement by the Holy Inquisition:—

“Ex S. Cong. S. R. U. Inquisitionis.

“Dubia quoad adsistentiam super quibusdam matrimoniis, exhibita a Vicario Apostolico Sandovicen.”

To the inquiry as to the propriety of remarrying divorced persons, the answer is—

“Ad sextum et septimum non licere, nisi constet matrimonium fuisse nullum, sive ob legem divertii in pactum deductam, sive ob aliquid aliud dirimens canonicum impedimentum.”¹

¹ Acta S. Sedis, vol. xxiii., pp. 700–703 (unbound, pt. xi., June 1891); and see *ante*, pp. 499, 500.

APPENDIX 3

— o —

FORM OF DISPENSATION FOR A MIXED MARRIAGE BETWEEN A CATHOLIC AND A NON-CATHOLIC USED IN THE ARCHBISHOPRIC OF WESTMINSTER

HERBERTUS

DEI ET APOSTOLICÆ SEDIS GRATIA

ARCHIEPISCOPUS-ELECTUS

WESTMONASTERIENSIS

VIRTUTE facultatum a SSmo. Domino Nostro LEONE Divinia Providentia PP. XIII. Nobis die mensis anno 189 benigne concessarum, dispensationem super impedimento *mixtæ religionis*, ob justas gravesque expositas causas, in Domino concedimus, quatenus Catholicæ matrimonium cum , acatholicæ baptizat licite contrahere possit; prævia tamen promissione triplici rite obtenta¹—1° scilicet a parte Catholica, de prole utriusque sexus in Catholicæ Religionis sanctitate educanda, et de non comparendo coram ministro hæretico; 2° a parte acatholica, de libero exercitio religionis parti Catholicæ permittendo, et de permittenda etiam Catholica,

¹ N.B.—*Sacerdotes omnes monemus hanc dispensationem ea conditione concedi, ut nulla prorsus maneat donec triplex supradictæ promissio, modo a Nobis præscripto, obtenta fuerit. Prescribimus autem ut promissiones prima et secunda fiant nominibus in pagina sequenti subscriptis, tertia vero saltem viva voce fiat.*

prolis utriusque sexus educatione ; 3° a parte Catholica, de conversione compartis acatholicæ pro viribus curanda : omissis insuper solemnitatibus et benedictione nuptiali, ac servatis omnibus quæ in matrimoniis mixtis servari debent.

Datum Westmonasterii, die

De mandato Rmi. Dni. mei Archiepiscopi.

PROMISES TO BE SIGNED BEFORE THE MARRIAGE

To be signed by the Catholic Party

I, the undersigned, do hereby solemnly promise and engage that all the children, of both sexes, who may be born of my marriage shall be baptized in the Catholic Church, and shall be carefully brought up in the knowledge and practice of the Catholic Religion ; and (according to the instructions of the Holy See) I also promise that my marriage in the Catholic Church shall not be preceded nor followed by any other religious marriage ceremony.

(Signature)

To be signed by the non-Catholic Party

I, the undersigned, do hereby solemnly promise and engage that I will not interfere with the religious belief of ¹ , my future ² , nor with ³ full and perfect liberty to fulfil all ³ duties as a Catholic ; and that I will allow all the children, of both sexes, who may be born of our marriage, to be baptized in the Catholic Church, and to be carefully brought up in the knowledge and practice of the Catholic Religion.

(Signature)

Date

¹ *Insert the name.*

² *Wife or husband.*

³ *Her or his.*

APPENDIX 4



FORM OF SOLEMNISATION OF MARRIAGE BY PROXY¹

THE following words were the form used at the solemnisation of the marriage by proxy of Margaret Tudor, daughter of Henry VII, to the King of Scotland, James IV. The marriage was celebrated by the Archbishop of Glasgow at the Royal Manor of Richmond, January 27, 1503, the King of Scotland being represented by the Earl of Bothwell as his proxy:—²

“I, Patrik Earll of Bothwyl, Procuratour of the right Excellent, right High and mighty Prince James By The Grace of God King of Scotland, my Soverayne Lord, having sufficient Authority, Power, and Commandement to contract Matrimony Per verba de Presenti, in the Name of and for my said Sovereigne Lord, with thee Margaret, the First begotten Daughter of the right Excellent, right High and mighty Prince and Princesse Henry by the Grace of God King of England, and Elizabeth Queene of the same, as by the Procuratory of my said Soveraine Lord, at this present tyme openly red and published, more playnly appearith by virtue of

¹ For marriages by proxy, see *ante*, pp. 22, 507.

² MS. formerly belonging to Thomas Hawley Clarencieux, King-at-Arms, now at the Herald's College, “M. 1, fo. 84b,” in the catalogue there. The Queen of Scotland's journey to Scotland is described in another MS., “1 M. 13, fo. 76.” Both MSS. are printed in Hearne's *Leland's Collectanea*, 1776 ed., vol. iv., pp. 258-300. The author begs to thank Dr. George W. Marshall, Rouge Croix, for his trouble and courtesy in allowing him to copy the MS., and helping him to read it.

the same Procuratory, and as Procurator of my said Sovereigne Lord James King of Scotland, and in his Name and Behalf, and by his Speciall Comandement, contract Matrimony with thee Margaret, and take thee into and for the Wiefte and Spous of my said Soveraine Lord James King of Scotland, and all uthir, for thee, as Procurator forsaid, forsakith Induryng his and thyne lyfes naturall, and thereto as Procurator forsaid, I plight, and gives thee his Faythe and Truthe, by Power and Autoritie foresaid committed and given to me.

“I, Margaret, the First begotten Daughter of the right Excellent, right High and mighty Prince and Princesse Henry by the Grace of God King of England, and Elizabeth Queene of the same, wittandly and of deliberate Mind haveing 12 Yeare’s compleat in Age in the moneth of November last be past, contract Matrimony with the right Excellent, right High and mighty Prince James King of Scotland, the person of whome Patricke Earle of Bothuile is Procurator ; and takes the said James King of Scotland unto and for my Husband and Spouse, and all other for him forsake Induring his and mine Life naturall ; and thereto I plight and gives to him, in your Person as Procuratour forsaide, my Faith and Trewth.”

APPENDIX 5



THE DIVORCE OF CATHARINE OF ARRAGON¹

THE following article, treating the divorce as a legal question, is printed as an appendix in order to show the working in practice of the Canon Law, explained in Chap. XVI :—

H.M. KING HENRY VIII *v.* H.R.H. CATHARINE,
DOWAGER PRINCESS OF WALES, F.C. H.M. QUEEN
CATHARINE

If the King had been an ordinary Titius suing Agnes in a Canonical Court, whether the suit had been heard out then in 1529, or in the present day, after and according to the procedure prescribed by the Bull of Benedict XIV, *Dei miseratione*, the “*orator*” would have had a very good case at Canon Law, according not only to the older cases collected in the books of the Rota, but also according to the decisions since 1865, reported in the *Acta S. Sedis*, for obtaining a decree of nullity as of right. But the King’s case was a purely legal one, and so technical that Shakespeare does not even indicate the grounds of his suit, though in the same play the trial of the Duke of Buckingham is reproduced almost verbatim. The “merits” in the King’s favour were, from the Protestant view, that the Scripture forbade utterly such marriages, and that the Pope had no power to permit that which the Word of God prohibited ; but in the Roman Catholic

¹ The case is reported 1 State Trials, 299.

point of view Henry's case was based on a technicality. Two points have been made against the King in public opinion—namely, first, that the King was divorcing the wife with whom he had lived for twenty years, and, secondly, that he was endeavouring to bastardise his child, the Princess Mary. The former of these Shakespeare (Act ii., scene 3) with much subtlety put into Anne Bullen's mouth. Both of these points are legally irrelevant and mere matter of prejudice. As to the first, it is clear Canon Law that, if the *impedimentum dirimens* be a public one, no length of cohabitation, whether or not accompanied by birth of issue, no acquiescence or ratification, creates a bar or estops the right of either party to a declaration of nullity. As to the second, the rule of the Canon Law is the same as that of Scotch law and of the Code Napoleon—viz., that the children of a marriage declared void are legitimate if the marriage was contracted *bonâ fide* even by one party. So the decree of nullity by the Canonical Court would not have bastardised the Princess Mary at Canon Law; in fact, the Pope's commission to the two cardinals specially empowered them in their discretion to pronounce the children of the first as well as the second marriage legitimate. By the Common Law of England the issue of a void marriage are illegitimate. The Common Law, by a fine distinction, referred the question of the validity of a marriage to the exclusive cognisance of a Court Christian, and accepted its decision as judgment *in rem*, and as conclusively avoiding the marriage; but in a question of legitimacy on this point, and also in "special bastardy," repudiated the Canon Law doctrine, and ignored the sentence in that behalf of the Ecclesiastical Court. Therefore by the law of England the Princess Mary would have been illegitimate if the Legatine Court had annulled her mother's marriage. But this illegitimacy at Common Law could, however, have been cured by statute according to the constitutional precedent of 20 Ric. II, Rot. Parl. 28, legitimising the issue of John Gaunt by Catharine Swinford, such issue being illegitimate at Canon and Common Law as born before marriage, and born "*ex damnato coitu*," though the Pope specially legitimised them "*per*

rescriptum principis." And, in fact, there was a declaratory enactment as to the Princess Mary's legitimacy.

Having cleared away these preliminaries, it remains to examine the facts. Arthur, Prince of Wales, eldest son of Henry VII, was born September 20, 1486, and at the age of fifteen married, on Sunday, November 14, 1501, the Infanta Catharine of Arragon, who was slightly older. The Prince and Princess of Wales cohabited for five months at Ludlow Castle and in London till the Prince's death, April 2, 1502. On December 26, 1503, Pope Julius II granted a dispensation for the marriage of Henry, Prince of Wales, with his deceased brother's widow, and at some date in 1504 they contracted marriage privately, not *in facie ecclesiæ*, but *per verba de præsente* or *de futuro*, with or without *subsequente copula*. Henry was born at Greenwich, June 28, 1491, and so this marriage, being contracted by a person under fourteen, was at Common Law voidable by act of the party. Accordingly, the very day he attained years of puberty—*i.e.*, June 27, 1505—Prince Henry, in exercise of his ordinary Common Law right, by written protest before the Bishop of Winchester and a notary public, disclaimed and avoided the marriage so previously contracted *de facto* during minority. This is the celebrated Protest; it contains no reference to Catharine being his sister-in-law, or to any scruple of conscience, and recites only that the marriage had been contracted in minority, and therefore without due consent. But, as Henry remarried Catharine publicly *in facie ecclesiæ*, June 3, 1509, when he was King, the former Protest became irrelevant, and it was barely referred to in the nullity suit. During the reign of Henry VII, Prince Henry and Catharine were forbidden by the King to cohabit; but on the old King's death, in April 1509, we may conclude that cohabitation at once began, as on January 1, 1510, was born their first child, Henry, Duke of Cornwall, who died in a few weeks. Several other births took place; but, except the Princess Mary, born in 1516, they all died young—a calamity which, in the trial scene of the play, the King cites as the judgment of heaven on the unlawful marriage. Cohabitation continued till 1525, or later.

Upon these facts the following conclusions of Canon Law arise. To a marriage between the widowed Princess of Wales and the deceased Prince Arthur's relations by consanguinity to the fourth degree, there arose the two dirimitory impediments of affinity and public honesty. The impediment of public honesty arises from *sponsalia* or marriage, even though such marriage may be invalid for lack of consummation. The impediment of affinity is created, not by marriage, but by sexual intercourse, whether lawful, and following on marriage, or illicit. Therefore it was only as regards the impediment of affinity that evidence of consummation or non-consummation between Arthur and Catharine was important. If the marriage of Catharine and Arthur had not been consummated there would be no impediment of affinity. On this question of fact Catharine had always denied that intercourse had taken place, but this was met by proof of contrary declarations by the deceased Prince. In this conflict of evidence no further proof of non-consummation being given than opposing declarations of husband and wife, a Court would hardly consider the strong presumption of intercourse arising from five months cohabitation to be rebutted. Affinity or public honesty, each of them constitute an *impedimentum dirimens*, rendering a marriage null and void, and, on proof of the impediment, either party is entitled to a declaratory sentence of nullity as of right. Both impediments of affinity and public honesty might be dispensed with by the Pope, and then a marriage following a proper dispensation would be valid, notwithstanding the impediments. That the Pope has no dispensing power in such a case may be good Protestantism; but, as a matter of Canon Law, it is unarguable, and, in fact, Henry's advocate at the trial never raised a contention that the dispensation was *ultra vires*. True, the limits of the dispensing power have never been defined; no dispensation has ever been granted for consanguinity in the first degree, *i.e.*, parent and child, brother and sister; or for affinity in the first degree *linea recta*, *i.e.*, stepfather and stepdaughter; but to dispense with affinity in the first degree collaterally, *i.e.*, deceased wife's sister or, as here, deceased husband's

brother, is fairly usual ; in fact, it is the instance selected in the model form given in the "Acta."

What the King's advocates did rely on was the *technical invalidity of the particular dispensation granted*, not on the powers of the papal granter. To appreciate the argument on the validity of a dispensation, it must be explained that a dispensation is not a simple permission for Titius to marry Agnes. It is a formal document, wherein after reciting an application by specified persons, and reciting the reason alleged by the applicant wherefor the dispensation should be granted, in the operative part, one or more specified impediments are removed. Further, it is a general principle of Canon Law laid down by all the Doctors that "*odiosæ et suspiciosæ sunt dispensationes et strictissime interpretandæ.*" Also somewhat like an insurance, it requires *uberrima fides* in the applicant, and a dispensation obtained *obreptione vel subreptione* is void ; not only fraud, but any material misrepresentation being fatal to its validity. Sanchez, De Matrimonio, devotes bk. viii., 179 folio pages, double column, to discussing dispensation, with a disquisition on every possible flaw. The argument as to validity of the marriage was therefore transformed into an argument on the validity and sufficiency of the actual dispensation granted. The original Bull of undoubted authenticity was produced in Court from proper custody on behalf of the King, and there was also produced, sent by the Queen's friends from Spain, a copy (whose original was retained by Charles V) of a Breve of even date with the Bull, granting the dispensation in terms somewhat differing from and slightly more favourable to the Queen than those of the Bull. The King's advocates denied the authenticity of the Breve. Firstly, the King's advocates raised a technical point of law, viz., that admitting that dispensation was valid, and the impediment of affinity was taken away thereby, yet the objection "*de publica honestate*" was no clearer. This objection applied equally to the Bull and the Breve, for neither the Bull nor the Breve contain any reference to this impediment either in the recitals or in the operative part. On this point of law there is direct authority. Sanchez discusses

this thesis, bk. viii. De Dispensationibus, disp. 24, n. 36, "*Quando occurrunt affinitas et publica honestas an sit utriusque mentio facto.*" And although Sanchez, after giving different views, states, in our opinion, that when one necessarily includes the other, both need not be mentioned, still the "*Declaratio arboris affinitatis*" appended to the Corpus Juris Canonici lays down, § 3, "*Quia licet sublatum sit impedimentum affinitatis non tamen sublatum est publica honestas.*" Secondly, besides the point of law, the King's advocates set up generally that the dispensation was void because obtained by fraud, concealment, and misrepresentation. The particulars of such fraud, etc., were—(1) Peace and union between England and Spain were alleged as a cause, whereas the peace, etc., was then firm. (2) Prince Henry's tender age (he being under puberty, in fact only twelve years old) was not mentioned; if the Pope had known this, he would not so easily have granted the dispensation. (3) It was pretended that Prince Henry desired the marriage only for the maintenance of peace between England and Spain, whereas from his tender years he was incapable of such thoughts. (4) Alternatively admitting the dispensation was good when granted, yet as the motive for granting it was the peace, and one of the sovereigns whose peace it was (*i.e.*, Elizabeth, the consort of Henry VII) died before the solemnisation, the cause failing, the dispensation must also become void. Were these objections sufficient to avoid the dispensation, and therefore the marriage? The second point, whether the misrepresentations were sufficient to annul the dispensation, is a question of fact which different minds might decide differently. To us the fourth misrepresentation, that a dispensation should be avoided by subsequent matter, seems untenable; the first also savours of special pleading, and could only be supported by a harsh grammatical construction of the language of the Bull explained away by the Breve; but the second and third appear to be founded on common sense, and to go to the root of the matter. As to the first point of law, granting it was a technicality, still it is supported by authority. Be this as it may, the King's case was eminently arguable, and it is

noteworthy that Henry, who was a subtle canonist, had such confidence in his case that he refused the Pope's suggestion of contracting a new marriage forthwith, preferring to obtain as of right a previous declaratory sentence of nullity.

The Legatine Court never proceeded to judgment. The proceedings in the suit were regular. Any Englishman was entitled to sue for nullity in the Ecclesiastical Court, diocesan or provincial, with the right of ultimate appeal to the Rota. By a process well known to Ecclesiastical Law, the King wished to institute his suit in the Appeal Court for this purpose given original jurisdiction. With this object, instead of, as originally intended, suing in an English Consistory or Arches Court, from which appeal lay to Rome, then menaced or actually occupied by the armies of Charles V, a commission from Pope Clement, dated June 9, and confirmed by a *pollicitatio*, dated July 13, 1528, was obtained constituting the two cardinals a Legatine Papal Court of both original, supreme, and ultimate jurisdiction, and to proceed judicially. The Court opened May 21, 1529; there followed citation, articles, examination, and publication, and on Friday, July 23, 1529, the cause was ripe for judgment. At that day Carpejus adjourned till October, on the ground that the Roman Vacation, which he was bound to observe, had already begun. But in September the advocacy of the cause to Rome, and inhibition of the Legatine Court, given by Clement contrary to his written promise on the word of a Pope, had arrived in England, and the Court never sat again. Henry waited for more than three years, negotiating to have the suit brought to judgment, till at last, in November 1532, he married Anne Boleyn, and in the following year, May 1533, Cranmer, Archbishop of Canterbury, gave sentence of nullity. At Rome the cause dragged on,—there is a gap at this epoch in the reports of the Rota, and it does not appear if there was any argument either by the advocates of the “orator” or “oratrix,” or by the defensor,—till at last, on March 25, 1534, the Pope, in a Consistory of Cardinals, of whom a minority voted against the marriage, pronounced the marriage with Catharine valid, and ordered restitution of conjugal rights.

APPENDIX 6



POWERS OF THE ARCHBISHOP OF WESTMINSTER AND OTHER ROMAN CATHOLIC BISHOPS IN ENGLAND TO DISPENSE WITH IMPEDIMENTS TO MARRIAGE

DE IMPEDIMENTIS MATRIMONIALIBUS

Impedimenta super quibus a S. Sede Episcopis in Anglia concessa est facultas dispensandi, ubi justæ gravesque adsint causæ, sunt quæ sequuntur.

I. *Mixtæ Religionis*: quando scilicet una pars est acatholica baptizata.

II. *Consanguinitatis et Affinitatis*.

1. Ad Matrimonia inter *Catholicos*.

(a) Ad Matrimonia *futura*. In 3° aut 4° gradu simplici; in 2°, 3°, et 4° gradibus mixtis; ac, “dummodo necessitas urgeat et dilationem res non patiatur,” in 2° gradu simplici, aut etiam in 1° et 2° gradibus mixtis.

(b) Ad matrimonia *præterita* sananda. In 3° aut 4° gradu simplici; in 2°, 3°, et 4° gradibus mixtis; in 2° gradu simplici, cum iis qui (i.e. *uterque*) ab hæresi vel infidelitate ad fidem Catholicam sunt conversi; et cum aliis Catholicis in 2° gradu simplici, aut etiam in 1° et 2° gradibus mixtis, “dummodo necessitas urgeat et dilationem res non patiatur.”

2. Ad Matrimonia *Mixta*² jam invalide contracta.

In 3° aut 4° gradu simplici; in 2°, 3°, et 4° gradibus

¹ Contracta scilicet inter partes Catholicam et acatholicam, et ubi pars acatholica non est postea ad fidem conversa.

mixtis; ac in 2° gradu simplici, aut etiam in 1° et 2° gradibus mixtis.

III. *Publicæ Honestatis*: impedimentum scilicet justis ex sponsalibus proveniens.

IV. *Criminis*: ubi tamen non fuerit ex alterutra parte machinatio mortis.

V. *Cognitionis spiritualis*: præterquam inter patrinum et baptizatam, vel matrinam et baptizatum.

* * (Quamquam communiter (exceptis matrimoniis supra II, n. 2, indicatis) nequeat pro eodem matrimonio super duplici impedimento dispensatio dari, per facultatem tamen extraordinariam potest nonnunquam, justis gravibusque accedentibus causis, in casibus quibusdam urgentioribus dispensari, quamvis duo vel plura simul concurrant ex prædictis impedimentis dirimentibus, sive ejusdem sive diversæ sint speciei, etiam concurrente impedimento mixtæ religionis.

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